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AN  
INQUIRY

INTO THE  
*RISE AND PROGRESS OF PARLIAMENT,  
CHIEFLY IN SCOTLAND;*

AND  
A COMPLETE SYSTEM OF THE LAW CONCERNING THE  
ELECTIONS OF THE REPRESENTATIVES FROM SCOT-  
LAND TO THE PARLIAMENT OF GREAT BRITAIN.

TO WHICH IS ADDED

*with* AN APPENDIX,

CONTAINING SEVERAL CURIOUS PAPERS AND INSTRUMENTS,  
AND FULL COPIES OF THE ELECTION STATUTES.

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By ALEXANDER WIGHT, ESQUIRE, ADVOCATE,  
S. S. A. SCOT.

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TO THE MOST NOBLE  
WILLIAM HENRY CAVENDISH

DUKE OF PORTLAND, &c. &c.

THE FOLLOWING SHEETS ARE

WITH THE GREATEST RESPECT

PRESENTED



AND MOST OBLIGING SERVANT

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A D V E R T I S E M E N T

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with a preliminary view of the Constitution of the Parliaments  
removed from Scotland to the Parliament of Great Britain.  
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## A D V E R T I S E M E N T.

**S**OME years ago the Author published, in Octavo, a "Treatise  
"on the Laws concerning the Election of the different Repre-  
"sentatives sent from Scotland to the Parliament of Great Britain,  
"with a Preliminary View of the Constitution of the Parliaments  
"of England and Scotland before the Union of the two kingdoms."

Since that time, many new cases have occurred, which have been the subject of decision in the Court of Session, and in Committees of the House of Commons.

On that account, and in order to correct some mistakes, the Author intended to publish a Second Edition. But the additions which he found it necessary to make in almost every page, soon convinced him that his Publication would form a new work rather than another edition of a former one; especially as, from his researches, he thought himself enabled to throw considerable additional light upon the Ancient Constitution of the Parliament of Scotland, a subject which has been but little attended to by the Historians of that part of the united kingdom.

The present Volume appears, therefore, under a different title. It has been considerably augmented, by inserting in the Appendix the Acts of the Parliaments of Scotland and Great Britain relative to the subject. The Author, however, flatters himself that the work will be more complete and useful by this addition, which was suggested by a friend, to whom, and to some others whose names it would do him honour to mention, he lay under great obligations in the prosecution of this undertaking.

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Act 20 George II. cap. 1.

253. 29. for an and his.

256. 7. for each and each.

258. 8. for the same and the same.

260. 12. after it and so.

262. 12. after it and so.

264. 25. for each and each.

ERRATA



# E R R A T A

*Page 7. line 14. for Monarch read Monarchs.*

- |      |                                           |
|------|-------------------------------------------|
| 23.  | 13. <i>after potestate add comma.</i>     |
| 90.  | penult, <i>for 11th read 10th.</i>        |
| 121. | 23. <i>for oath read oaths.</i>           |
| 157. | 18. <i>for statutory read statutable.</i> |
| 163. | 23. <i>for returned read retoured.</i>    |
| 191. | 19. <i>after this dele was.</i>           |
| 205. | 9. <i>for him read them.</i>              |
| 238. | 11. <i>for Anne read Annae.</i>           |
| 253. | 29. <i>for an read the.</i>               |
| 256. | 7. <i>for oath read oaths.</i>            |
| 276. | 6. <i>for statutory read statutable.</i>  |
| 296. | 12. <i>after it add to.</i>               |
| 332. | penult, <i>for ponte read parte.</i>      |
| 345. | 25. <i>for exclude read include.</i>      |



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## INTRODUCTION.

**G**REAT BRITAIN is the only monarchical state now existing, where the rights and privileges of the subject are, by the constitution, perfectly secured against the incroachments of the Prince, and where no law can be made, or tax imposed, without the consent of representatives chosen by the people.

Although it has been the work of many ages to bring this admirable constitution to that degree of perfection which it has now attained, the seeds of it are to be discovered in the annals of those nations that overspread Europe upon the declension of the Roman empire, and whose customs and manners made so remarkable an alteration upon the face of that quarter of the globe. Men who, from their infancy, had imbibed the spirit of liberty and independence, and allowed superior command only to superior merit, real or supposed, were not formed to yield to the unlimited controul of a single ruler, or to submit to the arbitrary dictates of one whom they themselves had elevated to distinction. Hence, in all the new kingdoms established in Europe, upon the irruption of the northern nations, the power of the Monarch, at first only the leader of the conquering army, was of a very limited nature. Nothing of moment was done or undertaken but with the advice of the great and leading men, the *Proceres Regni*, who formed a body known by

A

different



different names in different countries. The *Cortes* in the kingdoms of Arragon and Castile, the annual assemblies held in France under the names of *les Champs de Mars*, and *les Champs de Mai*, afterwards succeeded by the States General, the Wittenagemote in England during the Anglo-Saxon government, were all of one origin, and, being invested with high authority, rendered the power of the Kings more the shadow than the substance of regal dominion.

It must not, however, be supposed, that, in the ages to which I now refer, the whole body of the people were free and independent. The idea of an universal political liberty was then unknown. It was even inconsistent with the feudal system that took place in the new kingdoms of Europe; and no example of a constitution formed upon a basis so excellent appeared, till that system had greatly declined, and had been in a manner obliterated.

Neither must we suppose that one and the same mode of government was established in each of the several kingdoms formed upon the ruins of the Roman empire, or that the aristocratical liberty with which each was at first influenced, continued to produce the same effects in all. In some, the power of the Monarch was more, and in others less limited. In some, the national council was composed only of a few great and leading men; in others it was more diffused, and comprehended a greater part of the body of the people. The circumstances of situation, climate, soil, commerce, and religion; the dispositions and talents of Princes; the factions amongst the great men, tended, in the course of years, to introduce revolutions in the political system, and to form new constitutions of government; so that, while one nation daily improved, and at last brought its political liberty to the highest lustre, others gradually declined, and, in the end, sunk under the abject yoke of absolute monarchy.

To



To point out the various revolutions in government that have taken place in the different nations of Europe, and to trace the causes of these revolutions, were to write the history of many ages. The reader may consult other authors on that subject; which, though highly entertaining to a philosophic and inquiring mind, is not immediately connected with the view or intention of this Treatise. It will be sufficient for my purpose to give a short sketch of the rise and progress of Parliament in this island.



to trace the various revolutions in government that have taken place in the different nations of Europe, and to trace the causes of these revolutions, which were the history of many ages. The reader may consult other authors on this subject, which is though highly entertaining to a philosophic and improving mind, is not immediately connected with the view or intention of this Treatise. It will be sufficient for my purpose to give a short sketch of the progress of the human mind.



# B O O K I.

## Of the Rise and Progress of Parliament in Great Britain.

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### C H A P T E R I.

#### *Of the Parliament of England.*

AUTHORS have differed much with regard to the word PARLIAMENT. Some derive it from the French, others from the Celtic \*; but all agree that it was unknown in this island prior to the aera of the Norman conquest †; nor do we find it used in the sense now affixed to it, even in England, till the reign of Henry III. Hence Craig, in his Treatise *De Feudis* ‡, has been

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led

\* See Barrington's Observations, page 67.

† Ingulphus, a contemporary historian, uses it to denote an assembly or synod of Monks, page 103. 104. 131. Bruffel says, that, in France, the *Assemblée Generale* did not take the name of *Parliament* till about the middle of the 13th century: 'Enfin ce n'a été que vers le milieu du xiii. siècle que l'*Assemblée Generale*, autrement la cour de *Plaits généraux du Roi*, prit le nom de *Parlement*?' *Nouvel Examen de l'usage general des Fiefs en France*, par Monsieur Bruffel, vol. 1. pag. 321. The court of the four boroughs, which will be taken notice of in the sequel, was sometimes called by the name of *Parliament*. See *Curia Quatuor Burgorum*, cap. 1.

‡ Lib. 1. dieg. 7. § 11. He does not mention any of the Henrys in particular, but it is plain that he alludes to Henry III.



led to observe, that parliaments were first introduced by that Prince. But, although the great council of the nation was, during his reign, brought nearer to the plan upon which parliament is now established, those who suppose that the Kings of England were, till that period, possessed of absolute power, and unlimited authority, must be little versed in the history of that kingdom. In like manner, the word *Parliament* is not to be found in any of the Scottish statutes prior to those of Robert Bruce: And we are told by Abercromby \*, that it was used for the first time in Scotland in the treaty of marriage with Edward I. of England, in the year 1290; but, if I mistake not, it is to be found in an instrument of a still older date, to be taken notice of in the sequel, and inserted in the Appendix, No. 3. The thing itself, however, certainly existed at a much earlier period, though under another name.

What particular form of government took place in the different kingdoms or states into which the island of Great Britain was divided, before the greatest part of it became a Roman province, can only be a matter of conjecture. We look in vain for certainty in ages so dark and remote: But as, in all probability, it was peopled from Gaul, it is natural to suppose that the same manners and customs would be introduced which prevailed in that part of the continent whence the first settlers came, and are so well described by the two best historians their own, or, perhaps, any age has produced, Caesar and Tacitus.

While the province of Britain remained under the power of the Romans, it would no doubt be subject to their mode of government and laws; but, when they were obliged to abandon it, in order to preserve countries nearer the seat of empire, and the luxurious and effeminate

\* Vol. i. page. 460.



effeminate Britons were overpowered by the Saxons, the form of government to which these new conquerors were accustomed, and whose very language soon prevailed over all that part of the island which they subdued, would naturally take place. We accordingly find, that, even during the Heptarchy, all matters of public concern were directed by the King, with the advice of the great council of the nation, which was held under the several different names of *Michel Synoth*, or Great Council, *Michel-gemote*, or Great Meeting, and, more frequently, *Wittenagemote*, or the Meeting of the Wise Men.

After the union of the different kingdoms that composed the Heptarchy, King Alfred ordered this national assembly to meet twice in the year, or oftener, if necessary; and, as the succeeding Saxon and Danish Monarch held frequent councils of this sort, for the purpose of enacting laws, so, from the titles prefixed to these laws, we may safely conclude, that both the King and the great council were understood to have a joint, but neither of them an exclusive or independent authority, in matters of that kind \*.

Who

\* The preamble to the Laws of Alfred is thus expressed: ‘Ego Ælfredus Rex in unum colligi et literis consignari jussi, multa eorum quae parentes nostri observabant, quae mihi placebant, et multa eorum quae mihi non placebant rejeci cum meo sapienti concilio, et alio modo jussi observari, quoniam non audebam tentare meorum aliqua scriptis consignare. Porro, etiam me latuit quid eorum placuerit illis qui nobis succederent; ast cumprehenderim sive in diebus Inae cognati mei, vel in Offae Merciorum Regis, vel in Æthelberti, qui primus baptisma accepit in natione Anglica, ea quae mihi justissima videbantur, exinde collegi et reliqua neglexi. Ego Ælfredus occiduorum Saxonum Rex omnibus meis sapientibus hic usus sum, et illi dicebant quod ipsis omnibus bene placuerint ea ut observarentur.’ The laws of Edgar are intitled, ‘Hoc est institutum quod Eadgarus, cum sapientum suorum consilio, instituit.’ And those of Æthelred, ‘Hoc est consilium quod Æthelredus Rex et sapientes ejus consultaverunt.’



Who were the constituent members of this great council, our best antiquaries have not been able with certainty to decide. It is agreed on all hands, that the Bishops and Abbots, and the Aldermen, or governours of counties, were admitted to it; and it is not unnatural to suppose, that the judges, or men learned in the law, would likewise make part of an assembly of that kind. It is also probable, that the more considerable proprietors of land would be entitled to a seat in this national council; but I can see no certain ground for concluding, that, in those days, there was any such thing known as a representation of boroughs. The present cities and boroughs were then little better than villages; they were part of the demesnes either of the King or of great men; and the nature of the government favoured too much of aristocracy to countenance such a representation \*.

The Norman conquest is a remarkable æra in the English history, and could scarcely fail to produce at least a temporary revolution in the internal polity and constitution of that kingdom. William, though he founded his title to the crown both upon a pretended will of King Edward, and upon a supposed election by the people, still retained the idea and the manners of a foreign conqueror. He, for a time, indeed, shewed great affability and regard to his new subjects; but he took care to place all real power in the hands of his Norman followers; and the commotions that happened after he left the kingdom, on his first expedition to Normandy, furnished

‘consultaverunt.’ The *Liber Constitutionum* ascribed to the same Prince begins thus: ‘Haec est constitutio quam Rex Anglorum, et tam ordinibus consecrati, quam Laici sapientes, elegerunt et constituerunt.’ And the laws of Canute, though a conqueror, are described in the same manner: ‘Hoc est consilium quod Cnutus Rex, totius Angliæ et Danorum et Norwegorum Rex, cum sapientum suorum consilio, fancivit.’ See *Wilkins’s Anglo-Saxon Laws*. ■

\* See Brady’s *Treatise of English Boroughs*, page 3. 4. 5. &c.



ed him, at his return, with a pretext for using the English with much rigour. This produced new insurrections; but these, by proving unsuccessful, gave only a handle for still greater severity; and, by the confiscations which followed, added considerably to his power, and enabled him, even with some shew of justice, to gratify the rapacity of the Normans. He accordingly stripped the natives almost entirely of their property, and, establishing the feudal system over the whole kingdom, as it then subsisted in France and Normandy, he divided all the lands in England, exclusive of the church lands and the royal demesnes, into about 700 baronies, which, with the reservation of the ordinary feudal services, he bestowed upon the most considerable of his Norman followers; and these, again, parcelled out part of the lands so conferred upon them to other foreigners, who were denominated knights, or vassals, and paid to the barons the same services and submission which they themselves paid to the Sovereign. Nor did William stop here; he brought the ecclesiastical revenues under the same feudal government, and obliged the bishops and abbots to furnish, during the time of war, a certain number of knights, or military tenants, proportioned to the extent of territory which they possessed \*.

By this innovation, William's power must have become greater, and his authority more extensive, than that of any of the English Monarchs, during the period of the Anglo-Saxon government. The natives, either totally dispossessed of their lands, or glad to hold them of the Norman barons, would not be called upon to assist the Sovereign with their councils; and the Normans, who came in their place, owed too much to the arbitrary sway of William to pretend to controul his authority. Constantly employed, not only in his  
B reign,

\* At this time the number of knights fees in England was 60215, whereof 28015 were granted by William to the church, or in mortmain; *Biog. Brit. vol. 5. pag. 335.*



reign, but during the reigns of his immediate successors, either in securing themselves against the revolts of the natives, or in serving their Princes in expeditions to the continent, they could not, for some time, acquire so firm an establishment as to enable them effectually to repress the arbitrary dominion which these Princes exercised. No sooner, however, did they begin to unite with the nation, and to gain a security in their possessions, than the natural genius and manners of the country whence they came taught them to oppose even the appearance of despotism; and thus the very favours which the Conqueror bestowed upon his followers served to make them the more formidable to his posterity.

We must not, however, imagine, that the ancient mode of government suffered so material an alteration by the conquest, as to render the great council of the nation no longer a part of the constitution, or that the first Kings of the Norman race were totally independent. An alteration so favourable to the crown was not to be easily brought about, and was, indeed, totally inconsistent with the feudal system, which, if William did not first introduce into England, he certainly established and confirmed. It was the privilege, as well as the duty, of all those who held *in capite* of the Sovereign, to attend his great court, of which they were the peers; and, although William, and his immediate descendants, were not so dependent upon the will of the barons, who, from the causes above mentioned, were then only in the infancy of their power, there are many instances of these barons being summoned to attend the great council along with the dignified clergy, who were understood to have a twofold right to be called; *first*, in consequence of ancient usage during the Anglo-Saxon government; and, *secondly*, as being themselves the King's tenants *in capite* for their fees \*.

But

\* During the reigns of the three first Norman Kings, the great council met thrice  
in



But these councils differed materially from parliaments, as they are now understood. There was no election of representatives for counties or boroughs; no separate houses of Lords and Commons. The bishops, and abbots, and the barons, who were the immediate vassals of the crown, were the only members of these councils; and they all met together in one body to deliberate upon public affairs. Nay, what is very remarkable, instances occur of foreign barons sitting and voting in the great council of the nation; and we find laws that were enacted in foreign parts binding upon the kingdom. Several Norman barons voted in the great council which was summoned in 1164, by Henry II. for the purpose of trying Thomas a Becket \*: And one of the most equitable laws made in that Prince's reign, forbidding the goods of a vassal to be seized for the debt of his Lord, unless the vassal were surety for the debt, and ordering the rents of vassals to be paid to the creditors of the Lord, and not to the Lord himself, passed in a council which was held at Verneuil, and consisted of some prelates and barons of England, and others of Normandy, Poitou, Anjou, Maine, Touraine, and Brittany, and took place in all these different territories †.

B 2.

While

in the year, at the feasts of Easter, Whitsuntide, and Christmas. On these occasions no summons was needful or usual; and it was then called *Curia de more*, or *Curia Regis de more co-adunata*. But, if the King wanted to consult his great council at any other time, it was regularly summoned, and, by way of distinction, was termed *Conventus Principum ex Precepto Regis*; or *Conventus Procerum ex Edicto Regis*; *Archæologia*, vol. 2. pag. 308.

\* Fits-Steph. pag. 36.

† Bened. Abb. pag. 248. This author does not, indeed, say positively, that this law was ordered to be observed in England; but, as all the other countries mentioned by him were equally independent of each other, there is no reason to doubt its extending to England as well as to the rest. His words are: *Hoc statutum et consuetudinem statuit Dominus Rex, et teneri præcepit, in omnibus villis suis, et ubique in potestate*



While the immediate vassals of the crown continued to be few in number, there could be no necessity for representatives; but, in time, they became too numerous to meet together in one body. Those who had only small fees were likewise apt to consider attendance in the great council as a hardship, and, accordingly, wished to avoid it. Some denied their tenures, on purpose to get free of the burden; and others used interest to obtain charters exempting them from serving in parliament\*.

These circumstances, joined to the great alteration made upon the state of boroughs by the Norman Princes, who bestowed upon them territories in property, holding immediately of the crown, and by the accession of wealth which growing industry and commerce produced amongst their inhabitants, naturally occasioned a remarkable variation in the constitution of the great council. The ecclesiastical dignitaries,

‘ sua Normannia, et Aquitania, et Andegovia, et Brittaniam, generale et ratum. Et, ut  
 ‘ hoc statutum firmiter teneretur et ratum permaneret, scripto commendari, et sigilli  
 ‘ sui auctoritate confirmari fecit.’

Sir George McKenzie, in his Observations, page 12. takes notice of an act made in a Scottish parliament, or council, held upon the 23d of August 1513, within the kingdom of England, viz. at Twiesilhaugh in Northumberland; and thence he endeavours to refute the opinion, that the Kings of Scotland could not hold parliaments or councils without their own territories. But it is plain that this act, which was the last of James IV. and discharged the ward, relief, and marriage of the heirs of those who should be slain, or die in the army, was not passed in a regular parliament, or council of the nation. It bears to have been enacted only by the ‘ Kingis hienes with avise of  
 ‘ all his Lordis being there for the tyme in his oift;’ and, as its only object was to discharge certain casualties due to the crown, and it was calculated for a special encouragement to those of the King’s vassals who were then serving in his army, it needed not the sanction of the three estates. A similar indulgence, or encouragement, was given, by a regular meeting of the Scottish parliament, in 1522, not only to the crown vassals, but to the vassals of subject-superiors.

\* Coke 4. Inst. 49.



dignitaries, and the great barons, continued to attend in person, and were regularly summoned \*. The lesser barons deputed a certain number from each county to represent their body; and the boroughs, as immediate tenants of the crown, were likewise permitted to send representatives to the national assembly.

At what precise period this new establishment first took place, does not with certainty appear: It has been generally ascribed to that period of the reign of Henry III. when the Earl of Leicester was at the head of affairs. It seems, indeed, to be pretty evident from the great charter of King John, granted in 1205, that the representation of the smaller barons had not then been introduced: For as, by that charter, the Archbishops, Bishops, Abbots, Earls, and great barons of the realm, were to be summoned singly by the King's letters, so all the other smaller barons, who held of the King *in capite*, were to be summoned in general by the sheriffs and bailiffs. Neither does this charter authorise us to believe, that any representation of the boroughs had at that time taken place. The first summons for calling the representatives of counties and boroughs that is now extant, issued no earlier than the 49th year of Henry III †. And we

B 3

have

\* To neglect the summoning of them was to infringe the constitution. King John attempted to exercise a prerogative of this sort, but was obliged to give it up; and his great charter accordingly says: 'Ad habendum commune consilium regni faciemus summoneri Archiepiscopos, Episcopos, Abbates, Comites, et majores Barones regni, figillatim per literas nostras.' And, when Henry III. again neglected to summon some of the *majores barones*, the others refused to enter upon any business, 'quia omnes tunc temporis non fuerunt juxta tenorem Magnae Chartae suae vocati, et ideo, sine paribus suis tunc absentibus, nullum voluerunt tunc responsum dare, vel auxilium concedere, vel praestare.' The last attempt of this sort was made by Charles I. whom Buckingham, then afraid of being accused by the Earl of Bristol, prevailed with to forbid the sending a writ to that nobleman; but, on the application of the House of Lords, and their adjourning from day to day, and doing no business, the writ was at last issued; Sullivan, *Lecture 20.*

† Anno 1266.



have no certainty that the boroughs were regularly summoned so soon: All we find is, that the cities of York and Lincoln, and other boroughs of England, were written to, and required to send two of the most discreet men; and the first regular summons we meet with directed to sheriffs, for the election of citizens and burgessees, is in the 23d of Edward I. \*.

It is equally uncertain when the parliament of England was first separated into two houses: That separation must, however, have taken place before the year 1376, when we find a Speaker of the Commons elected by them †.

From

\* Anno 1295.

† This Speaker of the Commons, whose name was Peter de la Mare, had been imprisoned, and detained in custody, by Edward III. for his freedom of speech in attacking the mistress and the ministers of that Prince; *Hume, vol. 2. page 242.*

Carew, in his preface, page 6. says, that, in the parliaments of the 18th and 22d of Edward I. the Lords and Commons met together to hear the cause of calling the parliament, and, when that was declared, separated, in order to consider and debate a part of the matters given in charge. Sullivan says, that the separation of the two houses does not appear previous to the reign of Edward I. and supposes that it arose from the great barons disdaining to sit as equals with citizens and burgessees; *page 228.*

In the journals of Queen Elizabeth's parliaments, by Sir Simonds D'Ewes, page 515. another reason is to be found for the separation, viz. 'that the commons, sitting in presence of the King, and among the nobles, disliked it, and found fault that they had not free liberty to speak; and upon this reason, that they might speak more freely, being out of the royal sight of the King, and not among the great Lords, so far their betters, the house was divided, and came to sit afunder.' To this the following anecdote is added: 'A bold and worthy knight, at the time when this was sought, (the King desiring a reason of their request, and why they would separate from their betters), answered shortly, that his Majesty and the nobles being every one a great person, represented but themselves; but his commons, though they were but inferior men, yet every one of them represented a thousand of men.'



From that period we see a regular parliament, consisting of Lords and Commons; the *first* composed of the ecclesiastical dignitaries, and the great barons, or peers, who were summoned, *singulatim*, by the King's letters, and the *second*, of the representatives of counties and boroughs, who were summoned *per vice-comites*. And the only material alteration that happened, with regard to either of these bodies, down to the union of the two kingdoms, except during the time of the usurpation, when the constitution was totally unhinged, was, that, upon the dissolution of monasteries, in the reign of Henry VIII. the number of the Spiritual Lords was greatly reduced, being thenceforth confined to the two Archbishops, and twenty-four Bishops; whereas, formerly, the mitred Abbots and Priors made part of that branch of the upper-house\*.

By the act of the 4th of Edward III. cap. 14. a parliament was ordained to be held once a year, and oftener, if necessary. By the act of the 36th of the same Prince, cap. 10. it was likewise ordered to be held every year. By the statute of the 16th of Charles II. cap. 1. the sitting and holding of parliaments were not to be intermitted, or discontinued, above three years†. By the statute of the 6th of William and Mary, cap. 2. it was enacted, that, from thenceforth, a parliament should be

\* Before the dissolution of monasteries, twenty-six mitred Abbots, and two Priors, sat in the House of Lords; *Blackston, vol. 1. page 155.*

† This had been previously ordered by an act of the long parliament in 1640, known by the name of the *Triennial Bill*, which enacted, 'that a parliament should be held at least every three years, though the King should neglect to call it, in order to prevent the inconvenience arising from a too long intermission of parliaments.' And although the clauses in this act, compelling the sending out of writs, even without the King's consent, were thought to be an encroachment upon the prerogative, or, as Lord Clarendon says, 'derogatory to Majesty, and letting the reins too loose to the people,' and were accordingly repealed by the act of the 16th of Charles II. cap. 1. yet the principle was retained, it being thereby ordered, as mentioned in the text, 'that the sitting and holding of parliaments shall not be intermitted for above three years.'



be held once in three years at the least; and that no parliament should continue longer than three years from the day in which, by the writs, it was appointed to meet: But, by the act of the 1st of George I. cap. 38. it was ordered, that the then, and all subsequent parliaments, should have continuance for seven years, unless sooner dissolved by his Majesty and his successors.

Having thus presented the reader with a short sketch of the origin and constitution of the English parliament, and it being no part of my plan to enter into a discussion of the powers, or separate departments, of its several branches, or of the mode of election of the Commons that has been there established, I shall now proceed to consider the origin and constitution of the Parliament of Scotland.

## CHAP.



## CHAPTER II.

*Of the Parliament of Scotland.*

**I**N this chapter I propose, in the *first* place, to trace the origin and the ancient constitution of the parliament of Scotland; and, *next*, to state the several changes it underwent down to the union of the two kingdoms; after which, I shall point out in what particulars it differed most materially from the parliament of England, and attempt to explain the causes of these differences.

## SECTION I.

*Of the Origin, and ancient Constitution, of the Parliament of Scotland.*

THE more ancient history of Scotland, like that of other nations, is involved in obscurity and fable. Particular circumstances have also concurred to bring down that obscurity to a later period than otherwise would have happened. Without accusing Edward I. of England either of destroying or of abstracting the public records and monuments of the kingdom, it is certain, that, some how or other, many of them have perished, and that, comparatively speaking, few instruments, either of a public or private nature, prior to the twelfth century, have reached our days: Add to this the wonderful silence of our oldest historians, who, contented with giving a  
C recital



recital of foreign wars and intestine commotions, and vain of holding forth a long succession of imaginary Kings, have entirely neglected to transmit to posterity any distinct account of the constitution of their country, even in their own times; and it will no longer be a matter of surprise that we know so little of a subject of such importance.

The English have many of the laws of their Saxon Kings still preserved; and to the wise policy of William the Conqueror, they owe a tolerable knowledge of the state of their country at the period of that remarkable revolution which took place by his ascending the throne. The Scots do not even pretend to have any laws of an older date than the time of Malcolm II. who began to reign only in the year 1004; and, from the names of offices, and the titles, and other words, to be found in the statutes ascribed to that Prince, there arises at least a strong presumption that they are the composition of a later age. Sir H. Spelman conjectures, that the name of Malcolm II. has been erroneously substituted by transcribers in the place of Malcolm III. whose reign commenced in 1057, only a few years before the Norman conquest\*; but there is reason to believe that they are the production of a still later period†.

Notwithstanding this darkness attending the Scottish history, we may reasonably suppose, that, even in remote times, the form of government would be similar to that which took place in England after the arrival of the Saxons, and was established, though, perhaps, with some small variations, in the other nations of Europe that were formed upon the ruins of the Roman empire: For, as far back as we can go with any degree of certainty, we discover a limited monarchy;

\* Reliq. Spelm. pag. 28. *Essays on British Antiquities*, Essay I.

† See Inquiry into the authenticity of *Leges Malcolmi*.



narchy; and find, that all matters of consequence, or public concern, were transacted, not by the King alone, but by the King and his great council; and this great council is easily traced to have been of much the same nature with the great council of England during the time of the Saxons, and the reigns of the first Princes of the Norman line.

The statutes of William I. commonly called *William the Lion*, who began to reign in 1165, are thus titled: ‘Statuta five assissae regis Willielmi Regis Scotiae factae apud Perth, coram Episcopis, Abbatibus, Baronibus, et aliis probis hominibus terrae suae.’ And the first chapter begins with these remarkable words: ‘Placuit regi et consilio suo.’ The *Episcopi*, the *Abbates*, and the *Barones*, are well known; but it may be asked, Who were understood by the general description of the ‘alii probi homines terrae suae?’ whom we likewise find thus mentioned in the second chapter of the statutes of Alexander II. as making a part of the great council: ‘Statuit Dominus Rex Alexander, illustris Rex Scotiae, de consilio et assensu venerabilium patrum, Episcoporum, Abbatum, Comitum, Baronum, ac proborum hominum suorum Scotiae.’ The words are, no doubt, both comprehensive and vague; but the statutes of these two Princes seem themselves to give a pretty satisfactory answer to the question. In the 32d chapter of the *Statuta Willielmi*, there is an enumeration of the members of the great council, which is more particularly described as consisting of the *Praelati*, *Comites*, *Barones*, and *libere tenentes*. The words are: ‘Statuit Rex Willielmus apud Sconam, de communi consilio et deliberatione Praelatorum, Comitum, et Baronum, ac libere tenentium, quod ecclesia sancta Scotica, et sancta religio, et universus clerus in suis juribus, libertatibus, ac privilegiis omnibus, manu teneantur in quiete, pace, et semper sub protectione regia.’ Hence we have good reason to conclude, that the ‘alii probi homines terrae,’ mentioned in the



title of these laws, were no other than the small barons, who held *in capite* of the crown ; and this conclusion is farther confirmed by the 3d chapter of the statutes of Alexander II. which enacted, ‘ Quod de caetero, non fiat sacramentum de amissione vitae vel ‘ membrorum hominis, seu terrae, nisi per fideles homines, et per ‘ probos libere tenentes per cartas.’ Indeed, the word *homo* was the usual term in barbarous Latin to denote a feudal vassal ; hence the King’s vassals were, with propriety, called *homines sui*.

If the foregoing observations be well founded, we cannot pretend any authority from the legislature to pronounce, that, in those days, the inhabitants of boroughs made part of the great council of the nation ; nor, indeed, do such of our ancient laws as have been preserved authorise us, with any degree of certainty, to admit of representatives from boroughs, as a regular constituent part of the parliament of Scotland, sooner than the reign of David II. the immediate successor of Robert Bruce.

We are not possessed of any statutes passed during the reigns of Alexander III. or of John Baliol ; but there are still extant two collections of laws said to have been made in the reign of Robert Bruce, viz. the *Prima*, and the *Secunda Statuta Roberti*. From the *Statuta Secunda*, which, indeed, are not well authenticated, nothing is to be learned with regard to the constitution of the parliament at that time ; but, if the title prefixed to the *Statuta Prima*, which were enacted in a parliament held at Scone, in the 13th year of Robert’s reign, can with propriety be considered as evidence of the constituent members of that parliament, we may with reason conclude, that no representation of the boroughs had as yet taken place, no mention being there made of any such representatives. In that title they are thus described : ‘ Robertus, Dei gratia, Rex Scotorum, ‘ anno regni sui tertio decimo, dominica die post festum Sancti An-  
‘ dreae.



' dreae Apostoli in Scotia, cum continuatione dierum subsequen-  
 ' residens apud Sconam in pleno parlamento suo, tento ibidem,  
 ' sollempneque tractatu cum Episcopis, Abbatibus, Baronibus, et  
 ' aliis magnatibus de communitate totius regni ibidem congregata,  
 ' super variis et arduis negotiis ipsum, et regnum suum tangentibus,  
 ' ac in futuro tangere valentibus, ad honorem Dei, et sanctae matris  
 ' ecclesiae, ad emendationem terrae suae, tuitionem populi sui, et ad  
 ' pacem terrae suae manutenendam et affirmandam, de communi  
 ' consilio omnium Praelatorum, Comitum, Baronum, et libere te-  
 ' nentium praedictorum, ac totius communitatis praedictae, ordina-  
 ' vit, condidit, et stabilivit, statuta infra scripta, per totum regnum  
 ' suum, ab omnibus perpetuo et inviolabiliter observanda \*.'

There is surely nothing here that points out the inhabitants of  
 boroughs, or representatives from them; and we meet with an enu-  
 meration somewhat similar, but equally exclusive of every idea of  
 that kind, in the 32d chapter of the same collection of statutes,  
 which, in order to enforce their observance, was addressed to the  
 provosts and bailies of boroughs, as well as other judges, and would  
 not probably have overlooked the burghesses, if they had, in fact,  
 had any share in the passing of the laws thus solemnly promulgated  
 in the name of the Sovereign. It begins thus: ' Robertus, Dei gra-  
 ' tia, Rex Scotorum, Justitiariis, Vicecomitibus, Praepositis, et eorum  
 ' Balivis, ceterisque fidelibus suis universis et singulis, ad quorum  
 ' notitias praesentes literae pervenerint, salutem; Sciatis, quod de  
 ' consilio et expresse consensu Episcoporum, Abbatum, Priorum,  
 ' Comitum, et Baronum, ac totius communitatis regni nostri, in ple-  
 ' no parlamento, tento apud Sconam, die dominica proxima post  
 ' festum

\* Skene's edition of the old laws is not always to be trusted. I therefore take the  
 above quotation from the manuscript copy presented to the Advocates Library by the  
 Earl of Cromarty, which is the oldest now extant, and may therefore be esteemed the  
 freest from errors.



‘ festum Sancti Andreae Apostoli, cum continuatione dierum subsequentium, anno regni nostri tertio decimo, auctoritate nostra regia suprascripta statuta condita sunt, et affirmata. Quare vobis mandamus et praecipimus,’ &c.

1327  
It does, however, appear from an indenture drawn up in 1326, between Robert Bruce, and the Earls, Barons, freeholders, and communities of boroughs, as they are there termed, by which he obtained a grant, during life, of the tenth penny of all the rents and revenues belonging to the laity, that burgesses had, in some degree or other, been admitted to a parliament held upon that occasion\*; and, although so important a revolution is not taken notice of by any of our historians, it is certain that they were considered as a separate and distinct branch of the parliament in the reign of David II.; for, in the 41st chapter of the statutes of that Prince, the three estates, or ‘tres communitates regni,’ are particularly mentioned as follows: ‘In parlamento ad instantiam *trium communitatum*, per regem expressse concessum, et publice proclamatum,’ &c. In those days there was no distinction, in a parliamentary view, between the Earls and Barons, and the other freeholders. The third estate must therefore, even then, as it certainly did afterwards, have consisted of the burgesses, as the first did of the ecclesiastical dignitaries, and the second of the *Comites, Barones, and libere tenentes*.

Such is the portrait of the parliament of Scotland, that, in the times to which I now allude, is exhibited by what must, at least at the first sight, appear to be the best authority, viz. the declaration of the legislature itself. Several of our antiquaries, however, seem strongly inclined to believe, that a representation of the boroughs, in the  
legislative

\* The original indenture is in the Advocates Library; and a copy of it is to be found in the Appendix, No. 1.



legislative body, took place at a much earlier period. Amongst others, the author of 'Observations concerning the Public Law, and the Constitutional History of Scotland,' lately published, has shown himself a most warm advocate in behalf of that hypothesis; and, although the arguments he adduces are far from being conclusive, some of them are too specious to be altogether overlooked by those who wish to investigate a matter of some obscurity with that care and attention which the subject seems to require.

This author appeals, in the first place, to a charter of Malcolm III. which is said by him to make an express mention of the parliamentary powers of the *people*. The words of it are: 'In nomine Sanctae Trinitatis, ego Malcolmus, Dei gratia, Scotorum Basileus, auctoritate Regia, ac potestate Margaretae Reginae, uxoris meae, Episcoporum, Comitum, Baronumque regni mei confirmatione, et testimonio, clero etiam, *adquiescenteque populo*. Sciant praesentes et futuri me fundasse abbaciam in monte infirmorum,' &c. This instrument is, however, nowise decisive of the fact in proof of which it is quoted. For, in the *first* place, the King had no need of the assistance or concurrence of his great council to enable him to make a grant of lands for the support of a religious foundation. *Secondly*, If, from this charter, we are to infer, that the burgeses, as described by the word *populus*, made part of the great council, we must, upon the same authority, admit to that assembly the King's wife, and the whole body of the inferior clergy, who are likewise introduced as giving their confirmation to, and acquiescence in, the grant. *Thirdly*, There appears no good ground for making the word *populus* applicable to the burgeses. This author is indeed of opinion, that, whensoever the *people* are recorded as part of the parliament, in a period antecedent to the invention of knights of the shire, or representatives of counties, the allusion must be made to the burgeses, because the inferior tenants of the crown, or small barons, gave



gave personal attendance. This is, however, nothing but a mere conjecture, altogether unsupported by evidence, and not perfectly consistent with another of his notions, that burgeses are also alluded to in some of our ancient laws, by the words *alii magnates*. Did we ever find the *people*, in an enumeration of the constituent parts of the parliament expressly mentioning the small barons or *libere tenentes*; as well as the clergy and the nobility, there might be some colour for supposing that term to allude to the burgeses. But I have met with no instance of that sort; and, as the small barons are not particularly mentioned in this charter, we should be at least as well warranted to apply the word *populus* to them, even though its meaning were otherwise ambiguous, as to the burgeses, of whom no express notice is taken in any of the old laws. It is, however, unnecessary to enlarge upon this point; for, in the *last* place, the inference attempted to be drawn from this charter rests altogether upon a mistaken interpretation of the word *populus*, which was not meant to denote any particular rank or order of the legislature, but the laity in opposition to the clergy; ‘clero etiam, adquiescenteque populo;’ for in that sense it must always be understood, whensoever we find it, as here, joined to the *clerus*, or clergy. Of this many instances might be given from public instruments. Several are taken notice of by Doctor Brady in his answer to Mr Petit, page 70. *et seq.*

The term *communitas regni*, which frequently occurs in the old statutes, is also resorted to in aid of this favourite system, but affords it no support. The ‘*tota communitas regni*,’ mentioned in the 7th chapter of the *Statuta Willielmi*, which begins thus, ‘*Affisa regis Willielmi, facta apud Perth, quam Episcopi, Abbates, Comites, Barones, Thani, et tota communitas regni, tenere firmiter juraverunt,*’ is either merely exegetic, or applicable to the small barons only, the

‘probi



'probi homines terrae,' taken notice of in the preamble or title, and the 'libere tenentes' of the 32d chapter. In the like manner, the fourth chapter of the statutes of Alexander II. where it is said, 'Statuit Rex, per consilium et assensum totius communitatis suae,' proves only that the particular regulation then promulgated, was enacted with the advice and consent of the whole state, or community, as represented by the great council, but affords no pretence for the introduction of burgeses. Were we indeed to apply the 'tota communitas' to them, we must exclude all the other members of that assembly from having had any hand in the enactment of that statute. This will also serve as an answer to an argument attempted to be inferred from the same expression being used in the preamble to the laws of Robert I. We know, indeed, that, even in later times, the word *communitas* was frequently used to denote the whole collective body of the parliament. Thus, in the statutes of David II. cap. 28. and 29. we find, 'Statutum fuit per Regem et communitatem Scotiae,' and 'ordinatum fuit coram Rege in pleno parlamento apud Sconam, et per Regem et communitatem Scotiae,' and we are not at liberty to apply this term of generality to burgeses in particular, unless when, as in the indenture between Robert Bruce and his subjects, the word *burgorum* is added.

We shall pay still less regard to any argument drawn from these words, when we consider in what sense they are used in a variety of public instruments to be found in Rymer's Foedera. A few instances shall be given.

The letter from the Scottish nation, or, as it is called; *Litera communitatis Scotiae*, to Edward I. of England, counselling a marriage between Margaret of Norway and his eldest son, was written in the

D.

names



names of the four Guardians of the kingdom, ten Bishops, twelve Earls, twenty Abbots, eleven Priors, and forty-eight Barons. No notice whatever is taken in it of the boroughs; yet it bears, that they 'avaundyt Gardeyns, Evesques, Countes, Abbes, Priurs, et 'Barons,' were to send ambassadors to London to treat on that matter, and others touching the state of the kingdom of Scotland, 'pur nus et pur eus, et pur tote la commune de Escocce \*.'

Another instrument of certain ambassadors from England, relative to a treaty concluded between them and the Scottish nation, bears, 'Cum inter caetera contingunt negotium et tractatum, habitum inter 'excellentissimum principem dominum nostrum supra dictum ex 'parte una, et venerabiles patres, Custodes, et ceteros Episcopos, Ab- 'bates, et totum clericum, nobiles viros, Comites, et Barones, *totam- 'que communitatem* regni Scotiae ex altera,' &c. †.

In like manner, the letter from Edward I. to Eric King of Norway, respecting the marriage of the Princess Margaret, after mentioning his having obtained the Pope's dispensation, proceeds thus: 'Ad quod utique custodes, magnates, praelati, ac *tota communitas* 'praedicti regni Scotiae unanimi et expressa voluntate sua praebue- 'runt jam consensum ‡.'

We are by no means at liberty to suppose, that, by the expression *tota communitas*, or *tote la commune*, in these writings, boroughs, or representatives of them, were alluded to, but must consider it merely as exegetic, and used, in order to denote more clearly, that the measures agreed to by the ranks and orders of men particularly mentioned,

\* Foed. vol. 2. pag. 471.

† Ibid. vol. 2. pag. 482.

‡ Ibid. vol. 2. pag. 474.



mentioned, were to be understood the measures of the whole nation. It is indeed a strange interpretation of the word *communitas* to make it signify the *commons*, a term never used in the parliamentary language of Scotland in those days.

In England, the same general term was much used, even when totally unnecessary. The writ issued to the sheriff of Northamptonshire, in the twenty-third of Edward I. after ordering him to return two knights from the county, and two citizens, or burgesses, from each city or borough within it, proceeds as follows: 'Ita quod dicti milites plenam et sufficientem potestatem pro se et *communitate* comitatus praedicti, et dicti cives et burgenses pro se et *communitate* civitatum et burgorum praedictorum, divisim ab ipsis, hinc ibidem habeant.' In like manner, a commission for collecting an aid granted in the first of Edward II. begins thus: 'Rex militibus, liberis hominibus, et *toti communitati* comitatus de Middlesex, tam infra libertates quam extra, salutem; cum Comites, Barones, milites, liberi homines ac *communitates* comitatum regni nostri, vicesimum omnium bonorum suorum mobilium, civesque et burgenses, ac *communitates* omnium civitatum et burgorum ejusdem regni,' &c. This was indeed a matter of common stile, and shews the impropriety of laying so much stress upon the word *communitas*, and of supposing, that, when it is added to a more particular enumeration of the constituent members of the parliament, or great council of the nation, the *commons*, or representatives of cities and boroughs, must be understood to be thereby denoted. The *communitates burgorum* are well known: They properly signify the select bodies to whom the guardianship and the management of the boroughs were committed, whether they consisted of a mayor and aldermen, or jurats, or of provost, bailies, and counsellors. When, therefore, we hear of the *communitas civitatis* de A, or *burgi* de B. we are thereby to understand the rulers of such city or borough; but to suppose that the



*communitas regni* is applicable to burgesſes in particular, ſeems the play of a lively imagination, rather than an opinion formed on mature reflection. Even in the indenture between Robert Bruce and his ſubjects, we find, after the Comites, Barones, libere tenentes, and the *communitates burgorum*, the following unneceſſary and ſuperfluous addition, ‘ac univerſam communitatem totius regni.’

A more plauſible argument in favour of this hypotheſis, of a very ancient representation of the boroughs, has been drawn from the following paſſage of Fordun: ‘Hoc anno (1211) Rex Scotiae ‘Willielmus magnum tenuit concilium apud Strivelyn, ubi interfuit ‘frater ejus Comes David de Huntyndon, paulo poſt feſtum Sancti ‘Michaelis, ubi petito ab optimatibus auxilio, pro pecunia regi ‘Angliae ſolvenda, promiſerunt ſe daturus decem mille marcas, praeter ‘ter burgenſes regni qui ſex millia marcarum promiſerunt, praeter ‘eccleſias, ſuper quas nihil imponere praefumpſerunt.’ But, even allowing the moſt implicit credit to this author, with reſpect to the fact related by him, yet it is by no means a neceſſary concluſion, that, in thoſe days, the burgesſes were underſtood to make a part of the great council of the nation, or that they were bound to give ſuit and preſence there. There was no general tax then impoſed. Had that been the motive for calling this council, the clergy, who, in later times, bore the burden of one half of all taxes upon landed property, would not have been ſpared, how preſumptuous ſoever it might appear to the monk Fordun for laics to preſcribe to them in ſuch matters. Beſides, Fordun does not ſay that the burgesſes were preſent at that council, or that it was there they had promiſed fix thouſand merks. Taking his words literally, it was from the *optimates* only the aid was aſked by the King. It is however needleſs to go ſo critically to work; for although, upon an occaſion of this kind, the boroughs may have been induced to contribute a conſiderable ſum towards payment of the debt due to England, we are not

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at liberty thence to infer, that they were then become a regular and constitutional branch of the great council of the nation, or that any share of the legislative power had been committed to them. Even the famous indenture between Robert Bruce and the Earls, Barons, freeholders, and communities of boroughs, in 1326, goes no farther than to prove, that, when an extraordinary aid was to be advanced by any particular order or rank of men in the state, their own consent was necessary; and affords no evidence that the boroughs were, at that time, become a necessary part of the parliament in other respects, though they undoubtedly were so in the reign of David II. In those times it was seldom necessary to impose taxes upon the subjects, or to require money from them. The royal demesnes, and the feudal incidents, and other accustomed duties, were sufficient to answer the ordinary expence of government; and the military force requisite either for defending the kingdom, or for making incursions into England, was not composed of stipendiary troops, and needed no extraordinary supplies. It was only upon very pressing occasions that any thing of that sort became necessary, and, on these occasions, the different orders of the state contributed according to their inclinations and abilities. Although, therefore, we read of the King calling a council, and demanding an extraordinary aid, we are not thence to presume, that all the different orders of men who promised such aid, were necessary or constitutional parts of the parliament, whose deliberations were seldom turned towards such objects, but whose concurrence was an essential requisite in the enacting of laws, and in every thing of moment that related to the general welfare of the state. It is believed, that, in England, the burgeses, for some time after their introduction to parliament, separated after they had consented to the taxes required of them, although the other branches of that assembly continued to sit, and to deliberate upon the business of the nation \*. The representatives of cities and boroughs,

\* Hume, vol. 2. page 91.



roughs, who were summoned to parliament in 1283, appear also to have met at the village of Acton Burnet, while the rest sat at Shrewsbury\*.

It has been farther observed, that, in the league concluded between John Baliol and Philip of France, the towns and boroughs of Scotland appear as a branch of the parliament, under the description of *universitates et communitates civitatum et villarum regni Scotiae*. But the only ground for this observation is, its being mentioned by Philip in his instrument, that the ambassadors of the King of Scotland had promised the concurrence of all the different orders of men in that kingdom in a war against England, and to send their letters to the King of France, to that effect, under their seals: ‘Pro-  
 ‘miserunt insuper pariter procuratores praefati procuratorio nomine  
 ‘memorati Regis Scotiae, eundem regem curaturum et effecturum,  
 ‘quod tam Praelati, (quatenus eis de jure licebit), quam Comites,  
 ‘Barones, et alii nobiles, nec non universitates et communitates vil-  
 ‘larum regni Scotiae, erga nos et successores nostros, in guerra prae-  
 ‘dicta, pari modo in omnibus (sicut dictum est superius) se habe-  
 ‘bunt, dictoque Regi Angliae simili modo totis suis viribus guerram  
 ‘facient, sicut superius est expressum: Quodque tam praelati, quam  
 ‘Comites, Barones, ac alii nobiles, ac universitates communitatesque  
 ‘notabiles dicti regni Scotiae, suas nobis super hoc patentes literas  
 ‘suis munitas sigillis, quam citius fieri poterit destinabunt †.’ This, no doubt, shews, that Baliol, and his ambassadors, anxious to procure the French King’s alliance, wished to convince him of the hearty inclination of the whole Scottish nation to join in a war against England; but it affords no evidence that the boroughs made a constituent part of the parliament at that period.

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\* Doctor Henry, vol. 4. page 368.

† Foed. vol. 2. pag. 695.



The famous letter to the Pope has likewise been appealed to as a piece of evidence in favour of this hypothesis ; but it is equally indecisive. It was written in the names, *1st*, of several *Comites* ; *2dly*, of the Senescallus and the Buttellarius Scotiae ; *3dly*, of Jacobus Dominus de Douglas, Rogerus de Moubray, David Dominus de Brechin, David de Graham, and a number of other individuals ; and, *lastly*, of ‘ ceterique Barones, et libere tenentes, ac *tota communitas* regni Scotiae.’ But the observations already made upon the import of the words *tota communitas*, will not permit us to apply that expression in this letter to burghesses in particular. Had they been concerned in this business, or had it been thought necessary to hold them forth as concerned in it, a very different term would have been used ; and, instead of ‘ ceterique libere tenentes, ac *tota communitas* regni Scotiae,’ we should probably have seen, ‘ ceterique libere tenentes ac communitates civitatum et burgorum regni Scotiae.’ This letter seems rather to oppose, than to favour, the system in support of which it has been appealed to ; and, at any rate, must be of little consequence in the controversy, as it is an agreed point, that, in a few years after its date, representatives from boroughs were sent to the parliament, and composed the third estate.

Another ground has also been taken up in support of this system. It has been observed that the burghesses, being the King’s freeholders, and as such liable to give suit and presence in his courts, it is not to be presumed that they would be relieved of that burden in more ancient times, or would have submitted to it afterwards, unless they had been bound to do so by their mode of tenure \*. It must be admitted that this argument bears a specious appearance ; but, when thoroughly considered, it will not be found more decisive than the others. To examine it properly, we must distinguish periods, and  
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\* Essays on British Antiquities, Essay 2.



take under our view, as far as we have facts, or probable conjectures, to assist us in the inquiry, the state and condition of boroughs in different ages.

In those empires which owed their origin to the migration of a few individuals seeking a new habitation, cities or towns must soon have become conspicuous and important. For some time, the limits of the rising nation would indeed be confined to the walls or ramparts of the first settlement, and a small territory in its neighbourhood. Such is the picture given of old Rome; and such, probably, was the case of all the ancient states in Greece and Italy. Other cities, such as Tyre and Carthage, owed their splendour to commerce. But, in rude and uncultivated nations, (whether consisting of aboriginal inhabitants, or of the descendants of numerous swarms of barbarians issuing from their native woods), which have no intercourse, either in the way of commerce or of alliance, with foreign and more enlightened states, towns of any extent or consequence are not to be expected. Tacitus informs us \*, that the Germans did not live in towns, and could not even endure to have their houses contiguous; and, through the whole extensive continent of America, two nations only had attained to that degree of cultivation and refinement as to have built large and populous cities before it was discovered by the Europeans.

England was too long under the administration of the Romans not to have emerged from its original savage state. Cultivation, arts, refinement, and luxury, had made wide advances; and, although the next

\* Nullas Germanorum populis urbes habitari satis notum est; ne pati quidem inter se junctas fedes. Colunt discreti ac diversi, ut fons, ut campus, ut nemus placuit. Vicos locant, non in nostrum morem connexis et cohaerentibus aedificiis; suum quisque domum spatio circumdat, five adversus casus ignis remedium, five inscitia aedificandi.



next invaders threw every thing back into ancient barbarity, we are told, that, during the Roman dominion, the Britons had built twenty-eight considerable cities within the province \*. But in Scotland, where no regular government can be traced beyond the reign of Malcolm Canmore, where arts and commerce were little attended to, and where a strong degree of barbarism, and ferocity of manners, subsisted in much later ages, it is most likely that towns, and even villages, chiefly arose from men among the lower class of inhabitants, wishing to take shelter under the walls of the King's castles, or those of great Lords, or churchmen, to secure themselves in part, at least, from reciprocal injuries, and from the oppression of powerful individuals. We accordingly find our oldest boroughs situated in the neighbourhood of such castles, and may reasonably conclude, that their territories formerly made part of the castle domains.

Those who took up their residence in such places, found it necessary, for their farther security, to surround them with walls or fences, and to watch and ward them in a kind of military stile. Hence the towns or villages were termed *Burghs*, and their inhabitants *Burghenses*, long before the practice of incorporating, and forming them into communities, by charter, was introduced either in this island or on the continent of Europe. These *Burghenses* were of two sorts. Some towns were within the royal domains of Sovereigns, others within the territories of great Lords, Barons, or churchmen. The inhabitants of the former were stiled the *Burghenses Regis*, while those who lived and carried on their occupations in the latter were the *Burghenses* of the Lord of the territory. That this distinction was well known in England, is manifest from Domesday book; whence we likewise learn, that, in some towns, the *burghenses* were partly the King's, and partly those of a subject; and that, in others,

\* Gildas, Bede, lib. i.



others, there were burgesſes belonging to a number of different ſubjects \*. The ſame diſtinction took place in Scotland; and we accordingly meet with it in the 15th chapter of the *Leges Burgorum*, which runs thus: ‘Burgenſis Domini Regis poteſt habere duellum de Burgenſibus, Abbatis, Comitibus, Prioris, vel Baronis; et non e converſo.’

In thoſe days, each burgeſs paid a certain ſum yearly to the King, or Lord, in whoſe town he lived, or had his *burgagium* †. Certain cuſtoms were alſo exacted by theſe ſuperiors, or patrons, upon the ſale of different commodities. : But, in return, the burgeſſes were indulged, from time to time, with ſundry privileges, which put them upon a very different footing from the tenants, or *ruſtici*, whoſe occupation was entirely confined to agriculture, and who were not allowed to betake themſelves to any kind of traffic, or mechanic employment. This was a wiſe meaſure, well calculated to incite the burgeſſes to purſue with ſpirit their proper callings as tradesmen, manufacturers, ſhop-keepers, or merchants. And, in order to encourage reſort to the towns, we find in the *Leges Burgorum*, cap. 17. the following political regulation: ‘Si homo Comitibus vel Baronis, ſeu cujuſcunque ſervus fuerit, venerit in burgo et emerit ſibi bur-  
gagium, et manſerit in eodem burgagio per unum annum et unam diem, ſine calumnia Domini ſui, vel ejus balivi, ſemper erit liber, et libertate burgi gaudebit ſicut burgenſis, niſi ſit ſervus Domini Regis.’

THESE

\* See Brady’s Treatiſe of Boroughs, page 3. 4. 7. 8.

† The very firſt chapter of the *Leges Burgorum* is as follows: ‘Imprimis quilibet burgenſis debet Domino Regi burgagio quod defendit, pro particata terrae quinque denarios annuatim.’

The extent of a *particata terrae*, which Skene tranſlates a *rood of land*, is thus deſcribed in the 119th chapter of the ſame laws; ‘Particata terrae in baronia debet meſurari per ſex ulnas quae faciunt octodecem pedes mediocres, hoc eſt, neque de majoribus, neque de minoribus; particata terrae in burgo continet viginti pedes.’



These privileges were, however, found insufficient to protect even the King's burghs against the tyranny and oppression of the great Lords, or Barons, in their neighbourhood. To check, therefore, this evil, and, at the same time, to preserve still more effectually peace and quiet among the burghs themselves, a new policy was introduced, of establishing them into corporations or communities, by royal charters, granting them a certain territory for payment of a yearly sum, and appointing officers, to be chosen by themselves, for determining their private disputes, and managing their common affairs.

This was an important revolution in the state of the towns or boroughs. It is, however, an agreed point, that, even in France, it was only introduced in the time of Lewis the Gros, who began to reign in the year 1108 \*. In that kingdom, the bulk of which was in the possession of a few great Lords, who, though they held their dukedoms, or counties, of the King, were, in effect, sovereigns within their own territories, it was understood that the King could grant such establishments only to the towns within his own proper domains. The example was, however, soon followed by the great Lords, who, fond of imitating their Sovereign, or glad of a pretence for squeezing money from the inhabitants, also granted *communes* to their principal towns. The Count of Champagne granted one to the inhabitants of Meaux in 1179 †.

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Notwithstanding

\* Nos auteurs conviennent que *Louis le-Gros* est le premier de nos Rois qui ait accordé des communes aux villes. Il le fit dans la vûe de trouver par la le moyen d'apaiser les seditions qui y étoient pour lors tres frequentes, et surtout pour mettre les habitans de ces villes, en les unissant ainsi d'interet entr'eux, en etat de les maintenir contre les grand seigneurs qui les vexoient fortement; *Brussel, vol. 1. pag. 178.*

† *Brussel, vol. 1. pag. 183.*



Notwithstanding all that has been said by some writers with respect to the consequence and importance of the inhabitants of towns in England in more early ages, we have no just ground to believe that any establishment of this sort took place there till a considerable time after the Norman conquest. The so much boasted charter of the Conqueror to the city of London is, in truth, only a letter of protection, declaring, that the citizens should be treated as law worthy, not as slaves.

It is not natural to suppose that the boroughs should advance more rapidly in point of security and importance in Scotland than they did in France or England. Considerable privileges would no doubt be conferred upon the inhabitants of towns in Scotland, as well as in other kingdoms; but it is highly improbable that the establishment of corporations, or communities, had been introduced there, at a period when they were unknown in other states far more cultivated and commercial.

At what precise time the erection of such corporations first took place in Scotland, cannot, indeed, be discovered with certainty. The oldest charters to boroughs now extant, or of which we have any knowledge from later instruments, were given by William the Lion; and the most, if not all of these, are rather to be considered as grants of particular privileges to the inhabitants, than as charters erecting them into communities, or bodies corporate, with power to choose their own magistrates \*. An unprinted statute, in 1661, in favour of the borough of Rutherglen, does indeed mention a supplication then made to parliament by that borough, bearing, that it had

\* The truth of this remark seems to be justified by a charter of James III. to the town of Inverness, which recites, *verbatim*, four different charters by William the Lion, and some others by later Princes. It is to be found in the Appendix, No. 2.



had been erected a free borough by King David in the year 1126; but upon what authority that averment was made does not appear.

These observations being kept in view, our first object of inquiry must be, Whether or not the *burgenses Regis* made part of the great council of the nation before the towns or boroughs in which they resided had been erected into communities? And here the mind naturally revolts at the idea of its being either the duty or the privilege of every weaver, taylor, shoemaker, or other mechanic, possessed of a *particula terrae*, or other small property, in a paltry town or village, to give suit and presence in the King's great council, and to sit with high spirited nobles and dignified churchmen, and take a joint concern in all matters of importance respecting the state and government of the kingdom. Had such been the constitution, their superiority in point of numbers might at least have enabled them to assume the whole government, so far as it depended upon the resolutions of the national council, had they inclined to exert their power.

It may indeed be said, that, in those days, as well as in later times, representatives might be chosen by the King's burgeses, to act for them in the great council; but it is by no means probable that such an idea should then occur. Representation is a refinement in politics little suited with the manners of the age now under consideration. It is even natural only where a number of individuals are previously formed, by a political operation, into one body. But this could not be the case of the inhabitants of towns in Scotland before their being incorporated; for, till that happened, the individuals were no more connected with each other than the possessors of lands in the country, except in this single particular, that their properties being confined within smaller bounds, they lived in a closer neighbourhood;



bourhood, and took a joint concern in watching and defending the place of their abode. They enjoyed the immunities or privileges that were conferred on them from time to time as individuals residing in a particular place, not as members of an aggregate body.

We are not, however, under the necessity of trusting to conjecture, or even to probability alone. From facts that cannot be controverted, we obtain satisfactory evidence, that, while the *Burgenses Regis* remained unincorporated, they gave no attendance in parliament. The royal boroughs in Scotland were not all erected at one and the same time. We know with certainty that many towns were not put upon that footing till long after the burgeses formed the third estate in parliament. Some of them were incorporated in the fifteenth, some in the sixteenth, others in the seventeenth century; and one, viz. Campbeltown, was not erected till the 9th of April 1700. But, if all the King's burgeses had, by their mode of tenure, either enjoyed the right, or been bound to attend the parliament, or great council of the nation, by themselves, or by representatives, the more early erection of particular towns into free boroughs could neither have deprived the inhabitants of other towns, not then incorporated, of the privilege, nor have relieved them from the burden of such attendance. We know, however, that, after the burgeses came to form the third estate, or at least from the period at which their deputies came to be regularly mentioned in the records of parliament, no appearance was made in that national assembly by the inhabitants of the boroughs not hitherto erected, either personally, or by representatives.

Were it of material consequence to the argument, we might also be allowed to doubt, whether, prior to the erection of royal, or free boroughs in Scotland, the inhabitants of towns within the King's domains, though entitled to the appellation of *Burgenses Regis*,



*gis*, held their small properties by a proper feudal tenure. From fundry passages of the *Leges Burgorum*, commonly ascribed to David I. we have some reason to think, that, in the transmission of that kind of property, neither the nice feudal forms were observed, nor even any written instrument was required \*.

It only now remains to inquire, whether, after the erection of a town into a free borough, by a royal charter, the inhabitants or burgeses of that town did immediately, and of course, become either entitled, or bound, to attend personally, or by representatives, in the parliament, or great council of the nation. They then, no doubt, held their several properties immediately of the King by a feudal tenure; and, although the community in general was, properly speaking, the crown vassal, and the individual burgeses came all at last to receive their investitures from the bailies, yet many instances are to be found in the rolls of Robert Bruce and David II. of charters granted immediately by the Sovereign of particular tenements within boroughs, not only when such tenements had fallen to the crown by forfeiture, but even in consequence of the voluntary surrender or resignation of the former proprietors. Still, however, these burgeses would continue to be looked upon in a very different light from the owners of land in the country, who, by their tenure, were originally

\* The 9th chapter begins as follows: 'Quicumque tenuerit terram suam in pace per unum annum et unum diem, et sine calumnia, quam fideliter emit per testimonium duodecim vicinorum suorum; si quis eam calumniaverit post annum et diem, et fuerit in eadem regione et de aetate et non in carcere, et ipse infra praedictum terminum clameum inde non moverit, super hoc nunquam audietur.' And the 56th chapter runs thus: 'Quicumque vendiderit terram suam, vel partem terrae suae, ille qui vendit erit infra domum et exhibit, et alius foris stans intrabit; et unus dabit praeposito denarium pro exitu de terra, et alius dabit denarium pro introitu et *fasina*. Si autem excambiaverint inter se terram, uterque illorum dabit duos denarios.' It must be needless to observe, that the word *fasina* used here does not denote our present instruments of *fasine*. It means no more than the getting entry to the subject, or possession of it."



originally understood to be bound not only to serve their Sovereign in war, but to give personal suit and presence in his great courts, and to assist him with their counsel. The peculiar service incumbent on burgesses, besides payment of the feu-duty imposed upon the community, was to ward and watch in their own boroughs; and the occupations which they followed as tradesmen, manufacturers, shopkeepers, or merchants, requiring their daily attention, would at least check every idea of their being liable to personal attendance in parliament.

That, immediately after the erection of a town into a royal borough, its inhabitants might attend by representatives, is not indeed so violent a presumption. It is not, however, probable, that a measure of this kind should be instantly adopted upon the first erection of such communities. Alterations of the political form of government, in states still rude and unrefined, seldom take place so suddenly without a total revolution. Representation also necessarily supposes a pre-existing right in the individuals of the represented body, or an antecedent obligation upon them to attend in person; nor could the idea itself be natural in a country where the feudal principles still prevailed with vigour, although, in process of time, it might be borrowed from other countries where that system had already suffered a greater decline.

Although the cities and towns in France began to be incorporated in the commencement of the twelfth century, yet we know with certainty that no deputies from these communities appeared in the states general of that kingdom till near two hundred years after, when Philip the Fair introduced them into that assembly, chiefly, indeed, with a view to counterbalance the exorbitant power of the nobles, and to facilitate the imposition of new taxes \*. The most

\* Pasquier Recherche de la France, pag. 81. Mably Observat. sur l'Histoire de France, liv. 4. c. 3.



most ancient summons calling representatives from boroughs in England that is now known, was of no earlier a date than 1266; and the first regular order we meet with addressed to sheriffs, for the election of citizens and burgeses, issued in the 23d of Edward I. *anno* 1295. We have, however, no reason to suppose, that, in this respect, matters went on more rapidly in Scotland, a country which, how lightly soever some authors may think of the position, certainly borrowed many of its political forms and tenets, as well as private laws, from its more cultivated and important neighbours in the southern part of the island.

Nor is it at all wonderful or unnatural that the burgeses should submit, in time, to a burden to which they were not originally bound. Had every individual burges been required to attend, the burden would have been intolerable; but, as a few only were to go from each borough, and these were to have an allowance from the community for their trouble, it would appear light, especially when the respect to be acquired, and the opportunity to be found of promoting the interest of that part of the nation, by allowing their deputies to sit in parliament, were thrown into the opposite scale.

More light may be thrown upon this question, by taking notice of some passages of the Scottish history, which it seems difficult to reconcile with the idea of the burgeses being so very early a constituent part of the parliament, or great council of the nation.

In the year 1174, the Scots purchased the liberty of their King, William the Lion, who had been surpris'd and taken prisoner when besieging the castle of Alnwick, by allowing him to do homage to Henry II. of England for the kingdom of Scotland. This was a national affair, to which the concurrence of every branch of the legislature must have been necessary; but we hear not of its being con-

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sented to by any other persons or ranks in the state than the Barons and Clergy \*. Had the burgesſes made part of the parliament or great council at that period, their conſent muſt have been given, and would not have been overlooked, either in public monuments, or by the hiſtorians who have recorded the circumſtances of that important tranſaction. We are alſo informed, that, in the next year, 1175, William, with his clergy and barons, did homage to Henry at York, in terms of the treaty; but no notice is taken of burgesſes on that occaſion †.

We are told that Henry, a few years afterwards, offered to reſtore the caſtles of Roxburgh and Berwick, if William would pay the tenths of his kingdom for the Holy War; but that the Barons and clergy of Scotland made answer in parliament, that they would not give them although both Kings ſhould have ſworn to levy them ‡. The ſtory is thus related by Benedictus Abbas ||, ‘ Interim Henricus rex Angliae miſit Hugonem Dunelmensem episcopum, et quosdam alios familiares ſuos, tam clericos quam laicos, ad Willielmum regem Scotorum ad decimas colligendas de terra ſua. Ipſe enim obtulerat domino ſuo regi Angliae antequam transfretaret quatuor millia marcarum argenti pro caſtellis ſuis retrahendis. Cui rex Angliae reſpondit, requiem bene proſecturam ſi conceſſiſſet ei decimam terrae ſuae. Cujus petitionibus rex Scotiae ſatisfacere cupiens, conceſſit ei decimam quam petebat, ſi homines ſuos ad hoc faciendum inducere poſſet. Cum igitur praefatus Dunelmensis episcopus et ceteri domini regis Angliae nuncii veniſſent in *Leoneis*, ad locum qui dicitur *Brigeam*, ad loquendum cum rege Scotorum de

\* See Foed. V. 1. p. 39. R. de Diceto, p. 584.

† See Bened. Abb. p. 113. Chron. Melroſ. p. 173.

‡ Annals of Scotland, V. 1. p. 131.

|| Pag. 514.



‘ de decimis in terra sua colligendis ; ipse rex Scotorum, cum omni-  
 ‘ bus fere episcopis, et comitibus, et baronibus terrae suae, et cum  
 ‘ infinita hominum suorum multitudine, ad locum praefixum vene-  
 ‘ runt ; et audita adventus nunciorum regis causa, et eorum petitione,  
 ‘ habito cum suis consilio, respondit *se non posse animos eorum incli-*  
 ‘ *nare ad decimam dandam.* Et ipsi pro se responderunt, *se nunquam*  
 ‘ *decimam daturos ; nec etiam si rex Angliae et dominus eorum rex Sco-*  
 ‘ *tiae jurassent se illam habituros,* nunquam illam darent.’ This story  
 exhibits a remarkable picture of the independent spirit of the nobles  
 and clergy in those days ; but of the boroughs no notice is taken ;  
 nor have we any reason even to conjecture that they were consulted  
 on that occasion. It is, at least, more probable that the *infinita ho-*  
*minum suorum multitudo*, said to have attended the King at that time,  
 was composed of the other freeholders, and of the vassals and atten-  
 dants of the nobles, than of burghesses.

It is also a circumstance of some weight, that, in the transactions  
 relative to the settlement of the crown after the death of Alexan-  
 der Prince of Scotland, the son of Alexander III. not a vestige is to  
 be found of the boroughs interfering, or of their being consulted in  
 that business. Prince Alexander died on the 28th of January  
 1283-4, and, we are informed, that, on the 5th of the next month,  
 the succession was settled in a parliament held at Scone, and that the  
 nobles became bound to acknowledge Margaret Princess of Norway  
 as their Sovereign, failing any children Alexander might have, and  
 failing the issue of the Prince of Scotland deceased\*. The instru-  
 ment or deed of obligation is itself preserved†, and it is in the  
 names only of the Earls and Barons. It is not, however, probable  
 that the burghesses, or their representatives, would have been over-  
 looked,

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\* Annals of Scotland, V. 1. p. 182.

† Foed. V. 2. p. 266.



looked, if they had made part of the parliament or great council assembled to settle a matter of such importance. The silence of the other instruments already taken notice of, respecting the negotiations with Edward I. concerning the marriage of his son and the Princess of Norway, the young Queen of Scotland, is likewise highly inconsistent with the idea of the burgessees having then a seat in parliament; and to these may be added the famous letter binding the Scottish nation to deliver up the castles and fortresses to their Queen and Edward's son, in the event of her coming to England free of all matrimonial tie before the feast of All Saints. It begins thus: 'A tout ceus ke ceste lettre verront ou orrent, Robert par la grace de Deu eveske de Glasgow e Johan Comyn Gardeyns du Reaume de Escoce, e Aleyne par meyme la grace de Deu eveske de Cartheneyns, solempnes messages et procurors des outres Gardeyns e des eveskes, Abbes, Priors, Countes, et Barons, de tote la commune de Escoce saluz en Deu \*.'

It is likewise a circumstance of some moment, that, in a parliament held at Scone in 1294, when Baliol was prevailed with to dismiss all the Englishmen whom he maintained at his court, a committee of twelve was appointed, consisting of four Bishops, four Earls, and four Barons, by whose advice all national affairs were to be regulated †. It is, at least, natural to suppose that some burgessees would have been named of that committee, if they had then formed one of the estates of parliament.

Were I inclined to hazard a conjecture as to the first introduction of deputies from towns into the great council, I should pitch upon the year 1304, when Edward I. of England ordered a general council

\* Foed. V. 2. p. 488.

† Mat. Westm. p. 399.



council of the Scottish nation to be held at Perth, and that ten commissioners, viz. two Bishops, two Abbots, two Earls, two Barons, and two for the commons, '*deux pur la commune*,' should be elected and invested with parliamentary powers, and repair to London, where, with the concurrence of twenty commissioners from the parliament of England, they were to establish regulations for the government of Scotland. Representatives from boroughs had been introduced into the English parliament before this period; and it was natural for Edward to adopt the same policy in Scotland; but whether the practice, supposing it to have then begun, was afterwards continued without interruption, is far from being a clear point. The acts of parliament in 1315 and 1318 relative to the settlement of the succession to the crown of Scotland, throw little light upon the subject. The persons said to be present in the first of these parliaments were '*Episcopi, Abbates, Priores, Decani, Archidiaconi, et ceteri ecclesiarum Prelati, Comites, et ceteri de communitate regni Scotiae, tam clerici quam laici*;' and the act concludes thus, '*Et in hujus rei testimonium et evidentiam tam dominus rex, Dominus Edwardus germanus suus, Mariora filia dicti domini regis, et Comes Moravie supra dicti, quam Prelati, Comites, et Barones, et communitatis majores, singula sua una cum sigillis conventualium ecclesiarum, et monasteriorum regni Scotie huic ordinationi apparuerunt.*' The second of these parliaments was that held at Scone in the 13th of Robert Bruce, of which notice has already been taken. In the act now alluded to, the enumeration of the constituent members of that parliament is exceedingly general, mentioning only the '*Prelati, Comites, Barones, ac ceteri de communitate regni*,' and it concludes thus, '*Ad premissa vero omnia et singula fideliter sine dolo, fraude, aut fictione, seu malo ingenio, futuris temporibus observanda, Episcopi, Abbates, Priores, et ceteri de clero in forma eis a jure statuta, nec non Comites, Barones, milites, et libere tenentes, et ceteri de communitate tactis sacrosanctis*'

'Dei



‘ Dei evangeliis, et sanctorum reliquiis, magnum sacramentum presterunt; et in testimonium premissorum sigilla sua huic scripto apposuerunt \*.’

I cannot conclude this subject without observing, that although the silence of our historians respecting so important a revolution in the constitution as the admission of burgesses to parliament, affords matter of just surprise; yet, it is still more astonishing that we have been left equally ignorant in what manner the boroughs were represented for a very considerable period after they formed the third estate. History gives us no information what particular boroughs sent representatives, how many went from each, or in what way they were elected for a number of years after the time of David II. Even the records of parliament, that have been preserved, and from which some light might have been expected, afford none; for the middle of the 15th century was allowed to elapse before the names either of the nobles, or of the small barons, or of the commissioners from boroughs who attended in parliament, were entered in these records.

We

\* See Appendix to Anderson's *Independency*, No. 24. and 25.

These acts shew that the form of parliament was then fluctuating and unsettled, and probably depended much upon the will of the King, who might, on particular occasions, summon certain orders of men who were not bound to give constant attendance, nor understood to make a necessary part of the great council of the nation. The same observation is applicable to the English parliament about the same period. In the reign of Edward I. one parliament is to be found in which not a single clergyman appeared; and in another parliament, during the same reign, there were called not only the Archbishops, Bishops, Abbots, and Priors, but also the Archdeacons, with a representative of every chapter, and two representatives of the inferior clergy of every diocese; *Chron. T. Thorn. col. 196.*; *Brady's Introduction*, p. 155. Perhaps Robert Bruce thought it proper to require the attendance of an assembly both numerous and general, when an affair of so much moment as the settlement of the succession to the crown was to be the subject of deliberation.



We learn, however, from them, that although, in later times, none of the boroughs, except Edinburgh, sent more than one commissioner or representative to parliament, the case was otherwise at an earlier period. In a precept to the Baillie of Cowall, by James III. recited in the Essays on British Antiquities, the mandate for summoning the different orders to Parliament is thus expressed, 'Vobis praecipimus et mandamus, quatenus summoneatis seu publice summoneri faciatis, omnes et singulos Episcopos, Abbates, Priores, Comites, Barones, et caeteros libere tenentes, totius baliae vestrae, et de quolibet burgo *tres vel quatuor*, de sufficientioribus burgenfibus, sufficientem commissionem habentibus, quod compareant coram nobis dictis die et loco, in dicto nostro parlamento, una cum aliis regni nostri prelatiis, proceribus, et burgorum commissariis;' &c. and in a committee of the parliament held in 1467, we find the following names, 'for the borwis comissaris, for Edinburgh, Tho. Fockert, John Fawfide; for Lithgow, John Kerr, Henry Cavilin; for Strivlin, Richart Mar and Alexander Muschet; for Haddington, Wil. Habburton, Wil. Clerc; for Lanark, Wil. Bartram; for Perth, Andro Charteris, Alexander Bunsh; for Dundee, George Aberkerdo, David Aberkerdo.' Hence we learn, that, in those days, the boroughs of Linlithgow, Stirling, Haddington, Perth, and Dundee sent each of them two representatives to parliament. We, in like manner, find in the roll of the parliament 1471, two commissioners from each of the boroughs of Linlithgow and Dundee, as well as from Edinburgh. In the parliament 1503, there appear two for Stirling. In 1542, two for Perth and two for Dundee. In 1546, no fewer than three for Edinburgh. In 1612, two for each of the boroughs of Dundee, Stirling, St Andrews, and Glasgow. And in 1617, the same number for Perth, Dundee, Aberdeen, Glasgow, Ayr, St Andrews, Jedburgh, Rutherglen, Anstruther Wester, Anstruther Easter, Lanerk, Coupar, Linlithgow, Dumfries, Selkirk, and Kinghorn. But, in 1619, it was established by an order of the convention of  
royal



royal boroughs, that no more than one commissioner should go to parliament from any of the boroughs, but Edinburgh, which was to send two. We accordingly find, that, in the very next parliament, held in 1621, none but Edinburgh sent more than one, although commissioners attended for no fewer than forty-nine boroughs; and, from that time, down to the union, the same practice was observed\*.

It is only from the period of admitting the representatives of boroughs to the great council of the nation, that we can properly date the existence of parliament in the sense we now understand that word. I now proceed to mention the alterations that its constitution afterwards underwent.

## SECTION

\* In 1672 the borough of Anstruther Wester made a surrender in Parliament of its privileges as a royal borough; and that surrender was accepted, upon the condition that the rest of the royal boroughs should take upon themselves the burden of its share of the land-tax; but that not being done, it was, by an unprinted act of William and Mary, of the 22d July 1690, declared that this borough had never been divested of its royalty, and the clerk register was ordered to deliver back to the magistrates and inhabitants their charter of royalty. A copy of this act of William and Mary is inserted in the Appendix No. 3.

No commissioner was sent from this borough from 1672 till the meeting of the convention in 1689.

The borough of Kilrenny surrendered its royalty in the same manner, and at the same time; but I find no act in the records restoring it. George Beatown, who was sent as commissioner from that borough to the convention of estates and to the parliament 1689, was fined for non-attendance, upon the 10th of July 1689; *Records of Parliament.*



## SECTION II.

*Of the Alterations in the Constitution of the Parliament of Scotland, from the introduction of Representatives of Boroughs, down to the Union of the two Kingdoms.*

WE have seen that, in England, the representation of counties took place, at least, as early as the regular representation of boroughs can be traced with certainty. This was not, however, the case in Scotland; and, although it may well be supposed that the small Barons had, before that period, become too numerous to attend all in person, yet no attempt was made to relieve them till the seventh parliament of James I.\*.

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\* The author of 'Observations concerning the Public Law and the Constitutional History of Scotland,' lays it down, even dogmatically, that none of the King's tenants *in capite* were admitted to the Scottish Parliament but such as were possessed, at least, of a single knight's fee; and, with a considerable degree of acrimony, blames Doctor Robertson for admitting all such tenants to that honour, without exception. I suspect, however, that the Reverend Doctor's opinion is the best founded of the two. It was part of the duty of every tenant *in capite* to attend in the King's great council, how trifling soever the value of his estate might be; and as, by the act 1425, cap. 52. all the freeholders of the King within the realm were declared to be bound to attend the parliament; so the partial dispensation given to the small freeholders in the time of James II. and to be immediately taken notice of, was confined to such as had not L. 20 *per annum*. Indeed the lands in Scotland were never, as in England, divided into a certain number of knights fees; nor was any particular quantity or value of land distinguished by that appellation. And although some old charters are to be found which bear a grant of lands for the service of *one* or *more* knight's or milites, the instances are not very frequent. The passage in the Regiam Majestatem, which fixes the relief for a single knight's fee at 100 Shillings, is a mere transcript from Glanville, and only tends to prove that the first of these treatises is not a genuine collection of Scottish law.



It, indeed, appears that personal attendance was not always deemed absolutely necessary; but that it had been customary for those who were bound to serve in parliament to name procurators or deputies to act for them\*. This practice was, however, corrected by the statute 1425, cap. 52. which enacted, 'That all Prelates, Erles, Barronnes, and freeholders of the King, within the realme, sen they ar halden to give presence in the Kingis parliament and general council, fra thine foorth be halden to compeir in proper person, and not be a procuratour: but gif the procuratour alleage there and prove a lauchfull cause of their absence.' We accordingly learn from the titles prefixed to the acts of the sixth, seventh, and eighth parliaments of this Prince, that those who could not give a reasonable excuse for their absence were fined in L. 10. The words are, 'Comparentibus omnibus illis qui debuerunt et voluerunt et potuerunt commodè interesse, absentibus quibusdam aliis quorum quidem legitime excusati fuerunt, alii vero quasi per contumaciam se absentaverunt, quorum nomina patent in rotulis sectarum, quorum quisque adjudicabitur in amerciamento decem librarum †.'

But

\* Of this a remarkable instance is preserved in the chartulary of Kelso, which lies in the library of the Faculty of Advocates at Edinburgh. It is called in the chartulary 'Litera actornatus ad parliamentum,' and is, in fact, a power of attorney, by which the abbot of Kelso, with the consent of his chapter, appointed two different persons, or either of them, 'nostros veros ac legitimos actornatos seu procuratores speciales ad comparentum pro nobis et nostro monasterio in parlamento domini nostri regis apud Sconam,' &c. It wants the date, but there is some reason to think that it is as ancient as the year 1258. A full copy of it is to be found in the Appendix, No. 4.

† This fine was considerably increased by the acts 1587, cap. 34. and 1617, cap. 7. and still more so by two unprinted acts of the second session of the first parliament of Charles II. and by the first act of the third session of the first parliament of William and Mary. The act 1617 did, however, allow those prelates and peers who had a lawful excuse for their absence, to give proxies to some of their own estate to vote for them. But no such privilege was granted to the representatives of counties or boroughs.

That



But, by the act 1427, cap. 101. the small barons, and free tenants, (the old *libere tenentes*) were to be relieved of the burden of attending in parliament, on condition of their sending two or more wise men from each shire, according to its size, except the two shires of Clackmannan and Kinross, which being very small, were only to send each of them one commissioner \*. This act farther directed, that,

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That act likewise declared, that no excuse should be received or held lawful, but a license from the King, when residing within the kingdom, or, in his absence, from the High Commissioner; and in the absence of such Commissioner, from the Lord Chancellor and the Lords of the secret council, to be produced on the first day of the parliament. Sir G. McKenzie justly observes, that it was for the interest of the King to allow proxies, seeing it depended upon himself whether or no they were to be effectual, as he had it in his power to refuse a license to those of whom he was jealous; *Mackenzie's Observations*, p. 345.

\* It is remarkable that this act did not ascertain the precise number of commissioners to be sent from any of the shires except Kinross and Clackmannan; but it is still more remarkable that no subsequent statute was made to regulate that matter in clear and positive terms till the year 1690. An unprinted act in 1585, (a copy whereof is in the Appendix, No. 5.), by which it was remitted to the King to take under his consideration the representation of the small Barons, talks, indeed, of *two wise men* out of each shire, not even excepting Clackmannan and Kinross: But the act 1587, cap. 114. which passed in consequence thereof, refers, in general, to the numbers mentioned in the act 1427. The words are: 'Therefore his Majesty, &c. declaris and decernis  
' the said act maid be King James the first to take full effect and execution, and ratifies  
' and apprievis the same be this presents; and for the better execution thereof, ordainis  
' the commissioners of all the schireffdoms of this realme, according to the number  
' prescribed in the said act of parliament, to be elected,' &c. Are we then to suppose that it was discretionary in the several counties, during that period, to send more or fewer commissioners? The inequality of representation which this might have introduced would, perhaps, in those days, be little attended to: But, as the counties were to bear the expence of their commissioners, it is not probable that any of them would choose more than the smallest number required by the statute. We may therefore take it for granted, that, when the representation of the small Barons came actually to take place after the enactment of the statute 1587, none of the counties would send more  
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out of these commissioners, 'a wise and expert man' should be chosen, who should be called the *Common Speaker of Parliament*, 'and propose all things pertaining to the Commons in parliament,' and that all the commissioners should have costage, (*i. e.* their expences) from those of their respective shires who owed attendance in parliament \*.

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than two commissioners, and that the rule observed at first would be followed afterwards: And so the practice continued, till, by the act 1690, c. 11. it was ordered, that, to their former representatives, each of the shires of Edinburgh, Haddington, Berwick, Roxburgh, Lanerk, Dumfries, Air, Perth, Aberdeen, Fife, and Forfar, should, in time to come, add two, and each of the shires of Kircudbright, Stirling, Argyle, and Renfrew, add one. Even in England, the number of representatives from each county was not fixed till many years after the knights of the shires were introduced. By writs issued in the 22d of Edward I. two knights were appointed to be chosen, as at this day; but the King, not satisfied with that number, caused two more to be chosen. In the parliament of 1264, four knights were returned from each county.

\* By the act 1587, cap. 114. it was likewise enacted, that all freeholders should be taxed for the expence of the commissioners of the shires; that the Court of Session should yearly direct letters, at the instance of the commissioners, for calling the freeholders together, for the purpose of their making such taxation; and that, for the regular payment thereof, letters of horning and poinding (*i. e.* writs of distress) should be issued, upon a charge (notice) of six days. Still, however, this taxation was uncertain, and undetermined by law, as to the amount to be allowed to the commissioners; but, by the act 1661, cap. 35. five pounds Scots, (eight shillings and four-pence Sterling), were given to every commissioner for each day's attendance, including the first and last days of the parliament, and a reasonable time for their going from and returning to their counties, to which all the freeholders, heritors, and liferenters, (tenants for life), holding of the King, or of the Prince of Scotland, were to be liable, in proportion to the value of their respective lands and rents within the shire. This allowance was, however, only given for the days the commissioners actually attended: And, by the act 1690, cap. 1. the clerks of Session, as the deputies of the Clerk Register, were ordered to make federunts of each diet of parliament, and to mark those who were absent. By the same act, the Clerk Register was also directed to give certificates to the representatives of shires and boroughs of their attendance, in order that they might exact their fees from the shires and boroughs which they represented.

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It is here proper to define who were described in this, and a subsequent statute, to be immediately taken notice of, by the appellation of *Small Barons*.

In ancient times, all honours and dignities were annexed either to lands or to offices. Personal dignity was then unknown. An Earl or Count was the governour of a province, over which he had the chief jurisdiction. The office was at first held only for life; but William the Conqueror rendered it feudal and hereditary in England, allotting for the fees the third penny of all the suits determined in the Earl's court. The Earls, thus possessed both of great power and of wealth, would not think of submitting to the fatigue of business; and deputies were soon to be appointed, under the names of *Viccomites*, or *Sheriffs*, upon whom all the labour of the office devolved. Hence, in process of time, an Earldom came to be considered more a territorial dignity than an office. Fictitious or imaginary counties were established, by erecting certain lands into a *Comitatus*, for the purpose of conferring the title of Earl upon the owners; and, in those days, the dignity was so intimately connected with the land as to pass along with it to a purchaser. The *Viccomites* were then appointed by the crown; and hence we are not surpris'd when we read of a *Comes* being appointed a *Vicecomes* of the county from which he derived his title.

That Earldoms were territorial in Scotland, and passed with the lands erected into a *Comitatus*, has been clearly shown in the Additional

In order to prevent the election of certain persons as commissioners from the county of Dumfries in the year 1660, a bond was entered into, by which those to be chosen were to exact no fees; and this bond having afterwards been put on record, and made the means of procuring suspensions (injunctions) in favour of freeholders who were unwilling to pay these fees, it was declared void and null by an unprinted act of the parliament 1681; a copy whereof, as being a matter of some curiosity, is to be found in the Appendix, No. 6.



tional Case given into the House of Lords for the present Countess of Sutherland when claiming that dignity; and that lands were likewise erected into a *Dominium*, or Lordship, which was an inferior dignity to an Earldom, is equally certain. Of this a remarkable instance is to be found in an unprinted act of the 7th parliament of James VI. *anno* 1581, bearing, that the lands of Down had been feued by Queen Mary to Sir James Stewart of Down, knight, and  
 ‘erecting, creating, uniting, annexing, and incorporating, all and  
 ‘fundry the foresaid lands, offices, and other particulars above written, in an *Lordship*, to be called, in all time coming, the *Lordship*  
 ‘of Down; decerning and ordaining the said Sir James, his heirs and  
 ‘successors, specified in the infeftment, in all time coming, to be called and intituled *Lords of Down*, who shall have the honour, dignity, place, and preheminance, of a Lord of our Sovereign Lord’s  
 ‘parliament, in all parliaments, assemblies, and other conventions,  
 ‘with his arms effeiring thereto, and giving unto him all honours, dignities, and preheminencies, which pertained, or of right and  
 ‘consuetude ought to pertain, to a Lord of parliament.’ It has been supposed that the minority of the King at that time was the reason why this erection was made in parliament.

Titles of honour came, however, in time, to be merely personal, and to be conferred altogether independent either of lands or of office.

Of this we have an instance in England as early as the reign of Richard II. who, in the year 1387, created John Beauchamp of Holt, Baron of Kiderminster, and Lord of parliament. The patent is in the following words: ‘Rex, &c. Salutem; sciatis quod pro bono fervitio quod dilectus et fidelis miles noster Joannes de Beauchamp  
 ‘de Holte, senescallus hospitii nostri nobis impendit, ipsum Joannem  
 ‘in unum Parium et Baronum regni nostri Angliae praefecimus,  
 ‘volentes



‘volentes quod idem Joannes, et haeredes masculi de corpore suo  
 ‘exeuntes, statum Baronis obtineant, ac Domini de Beauchamp,  
 ‘et Barones de Kiderminster nuncupentur. In cujus,’ &c.

The first certain instance we can discover of an Earl created in this manner in Scotland, is in the beginning of the 16th century, when Gilbert, Lord Kennedy, was made Earl of Cassilis \*. Lords of Parliament had, however, been created in the same way, at least as early, if not before, as the reign of James I †. And, although pa-  
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\* In the records of the Lords of Council we find David Lord Kennedy appearing as procurator for the Laird of Bergeny upon the 7th of August 1509; and upon the 17th of November, in the same year, mention is made of an action at the suit of David Lord Kennedy, *now Earl of Cassilis, &c.* Hence it appears that he was created an Earl in the interval between these two periods; and that his title was merely personal, and not the consequence of his estate being erected into an Earldom, is evident from the subsequent charters of the family down to the year 1642, in which the lands of Cassilis are always denominated a *Barony*. It was in that year, and not sooner, that this barony was erected into an Earldom.

† Robert III. died in 1405, when his son, James I. was both a minor, and a prisoner in England, where he was detained till the year 1424; and within three years after his return to Scotland, the act of parliament, dispensing with the attendance of the small Barons, was passed. But, by this act, it was appointed, that Bishops, Abbots, Priors, Dukes, Earls, *Lords of Parliament*, and Barrents, (Knights Bannerets, created by the King, in the field of battle, under the royal banner), should be summoned to parliament by special precept. This affords some ground for believing that the practice of conferring personal honours had been introduced before that time; and although, through the carelessness of our historians, and the want of regular records, we cannot fix the precise period when this innovation first took place, we know, that, before the year 1459, Gilbert Kennedy had been created Lord Kennedy; and that, in 1473, Sir Alexander Home was created Lord Home in parliament, although neither of their estates had been then erected into Dominia, or Lordships, but remained still mere Baronies.

Mr Wallace, in his *Thoughts on the Origin of Feudal Tenures, and the Descent of Ancient Peerages in Scotland*, would have us to believe, that, till the year 1587, when  
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tents were at length introduced, it is highly probable, that, for some time, no other form was used in bestowing that personal dignity but what is contained in the records of parliament, bearing, that the King, in full parliament, created such a man (and his heirs general, or limited, as there mentioned) a Lord of Parliament, and ordained him to be stiled Lord A. of B. or so forth; the ordinary mode being to prefix Lord to the surname, and to add the name of a certain land or territory, such as Lord Lindsay of Byres, or Lord Stewart of Ochiltree.

The possessors of these honours, in whatever way created, were the Peers, or Great Barons; and, in contradistinction to them, all the other owners of lands, who held of the King *in capite*, were denominated Small Barons, or Freeholders.

It is not improbable, that, at the time of passing this act of parliament, 1427, cap. 101. James I. who had received his education in England, intended to put the parliament of Scotland upon the same footing with the English parliament, and to render the Commons a separate house. But if such was his intention, it did not take effect.

On

the representation of the small barons was established, no personal honours conferred a right to sit in parliament independent of landed property, every owner whereof, when it held of the crown, had already an elective seat. This, however, may be doubted. If it was not essential to the creation of Peers of Parliament that they should be previously possessed of land, it is not easy to figure why the Sovereign might not bestow a personal dignity of that sort upon those, who, on account of their merit, or other causes, might appear worthy of it, although possessed of no land whatever. I cannot, however, discover any reason in the nature of the thing, and far less any proof that it was necessary for a person who was to be created a Lord of Parliament to be a land-owner, or that his heirs were to be deprived either of the title, or of any of the privileges attending it, upon their disposing of the estate which their ancestor held when he was ennobled. They must therefore have been entitled to sit in parliament in virtue of their personal honours, independent of their lands altogether.



On the contrary, no part of this statute seems to have been much regarded. The small barons neglected to elect commissioners, and were, of course, still bound to give personal attendance, that being the condition under which they were to be relieved of the burden. We accordingly find a new act passed about thirty years after, by which it was enacted, 'That no freeholder under L. 20 should be 'constrained to come to parliament, as for presence, except he were 'a baron \*, or were specially called by the King's officer, or by 'writ †.' And in the reign of James IV. another act passed, relieving all barons and freeholders whose estates were within 100 merks of new extent ‡, unless specially written for by the King; but enjoining all those of a higher extent § to come to the parliament under the pain of the old fine. It was, however, made a condition of the dispensation granted by these statutes to particular freeholders, that they should send proxies or attornies to answer for them. The act of James II. went no farther than to declare that they should not be constrained to come to parliament, *as for presence*. And, by the act of James IV. they were to be relieved of the fines usually imposed upon absentees, only on condition of their sending procurators to answer for them. The words of the act are, 'and sa 'not to be unlawed for their presence, and || they send their procuratores to answer for them, with the Baronnes of the schire, or 'the maist famous persons.'

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Notwithstanding

\* The appellation of *Baron*, in this statute, has no relation to Peerage. Those whose lands were, by their charters, erected into a free barony, had a considerable jurisdiction within their bounds, which ordinary freeholders did not enjoy.

† 1457, cap. 75. In England, in the time of Edward II. a knight's fee was, by statute, L. 20 Sterling *per annum*; and, according to Sir Edward Coke, 480 acres of land.

‡ 1503, cap. 78.

§ The meaning of this term will be explained in the sequel.

|| The word *and* is here used for *if*.



Notwithstanding these acts, the small Barons continued very remiss in their attendance. Few of them went to parliament, except upon particular occasions \*, so that, at last, a doubt arose of their being entitled to a seat †; and it was not till the reign of James VI. that their representation by commissioners was fully established.

This was done by the act 1587, cap. 114. which, proceeding upon a recital of the old statute of James I. and of its propriety and expediency, renewed and confirmed that part of it which related to the choosing of commissioners, and regulated the manner in which they were to be elected and warned to parliament ‡.

The

\* During the reign of James III. the number of those who attended never amounted to thirty, and was often much less. In the reign of James IV. twelve was the highest number; and, in some of the parliaments of that Prince, not one appeared. In the time of James V. we find only two or three; and the case was the same during the first period of the reign of Mary.

† This we learn from a letter written by Thomas Randolph to Sir William Cecil, of the 10th of August 1560, in which he transmitted a copy of a petition from the small Barons, or freeholders, praying to be admitted to the parliament that was then held, and desiring that all former acts concerning their place and estate, and in their favour, should be confirmed. The original letter is in the paper office in the Tower of London; and a part of it is to be found in the Appendix, No. 7. A copy of the petition from the small Barons, which Mr Randolph transmitted to Sir William Cecil, is likewise to be found in the Appendix, No. 8.

In order to give the reader a better idea of the parliament of Scotland at different periods, before the representation of the small Barons took effect, there are inserted in the Appendix, No.'s 9. 10. and 11. lists of some of the thinnest parliaments, and of those which were best attended. There is also to be found in the Appendix, No. 12. a copy of an original minute of the first sederunt of the parliament 1579, with which I was favoured by the under keepers of the records.

‡ In procuring this act, James has been supposed to have had it in view to acquire a balance against the overgrown power of the nobility, much increased since the



The act of James I. allowed every freeholder a voice in the election of commissioners; but, by the statute now under consideration, those only who were possessed of a forty shilling land in free tenantry, and had their actual dwelling and residence within the shire, were permitted to vote.

The qualification of the commissioners required by this statute was, that they should be the King's freeholders, resident indwellers (inhabitants) within the shire, of good rent, and well esteemed. But what the amount of their rent or estate should be is not mentioned. It is probable that the rent which entitled a freeholder to elect, would also entitle him to be elected a commissioner.

With regard to the mode of election, the freeholders were appointed to meet yearly at the first head court after Michaelmas \*, or at any other time when they should please to assemble for that purpose, or be required to do so by his Majesty; and, after choosing their commissioners, they were to notify their names in writing to the Director of the Chancery. This act farther ordered the com-

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missions

the reformation, and by the abolition of the abbacies. Great opposition was accordingly made to it on the part of the nobility, some of whom even protested against it, but in vain. See *Essays on British Antiquities*, page 42.

\* Of old, the sheriffs of the several counties were bound to hold three head courts in the year for the due administration of justice, at which all the freeholders were obliged to attend; *Quon. Attach. cap. 32. § 3. and 5.* Those who owed suit and presence were to attend personally, but those who owed suit only were allowed to send their suitors or proxies, provided such proxies were qualified to pass upon an assize or jury, 1540, cap. 71.; but at present there is only one head court held in the year, upon a fixed day, either Michaelmas day, or near about that time. There the freeholders assemble to adjust their rolls, in the manner to be afterwards taken notice of. No freeholder, however, can now be subjected to any fine for absence from a sheriff-court, unless he be summoned to serve as a jurymen, or for some other lawful purpose; 20th Geo. II. cap. 50.



missions to be sealed and subscribed by at least six of the barons and freeholders; and, by a subsequent act of the same Prince \*, none were to be received as commissioners for shires in parliament, without producing sufficient commissions granted to them in a full convention of all the barons of the shire, and authorised (authenticated) by the subscriptions of a great number of the barons then present, and of the clerk of the meeting †.

The commissioners for shires being thus to be yearly elected, the statute directed that they should be warned to any parliament or convention to be afterwards held, by precepts issuing from the Chancery, the form of summoning to parliament that was in use before the less troublesome mode of a general proclamation took place.

It was farther appointed by this act, that an equal number of commissioners from shires should be upon the committee of articles ‡ with those put upon that committee from amongst the commissioners of boroughs, and that their appearance in parliament should relieve all the remaining small barons and freeholders from the necessity of personal attendance.

But, as this statute did not expressly exclude the other small barons, it may be asked, Whether they might still have attended in person, notwithstanding their sending commissioners to parliament? I apprehend, however, that this question must be answered in the negative. To attend both personally, and by representatives, would have

\* 1597, cap. 276.

† A copy of a commission from a shire to its representatives is to be found in the Appendix, No. 13.

‡ The nature of this committee, which was named at the beginning of each parliament, will be fully explained in the sequel.



have been inconsistent; and, although our statutes are not always very accurately expressed, we may safely conclude that it was the intention of the legislature to exclude them. We accordingly find no instance of their ever after appearing in parliament but by their commissioners.

It may also be asked, Whether, after the passing of this act, the King might call any particular baron to attend in parliament, though not chosen by his county? Sir George M'Kenzie, ever a most zealous stickler for the prerogative of the crown, thought it just that the King should have that power; adding as a reason, that he might make any man a Lord of Parliament. See his Observations, page 114. Of this, however, he gives no instance; and thence we may conclude that no such prerogative was understood to be in the crown. As long as the small barons were bound to attend personally, with the exception only of those who were not possessed of an estate first of L. 20, and afterwards of 100 merks of new extent, it might be safe to permit the King to require the attendance even of persons falling under the exception; and he was accordingly allowed to do so by the acts 1457, cap. 75. and 1503, cap. 78. But it would have been inconsistent, and even dangerous, to continue a prerogative of that sort, after a regular representation of the small barons had been introduced. The King might indeed ennoble whom he pleased, and by that means increase the number of great barons, or Lords of Parliament. But he certainly had it not in his power to increase the number of representatives from counties, or to give seats in parliament to the electors, as well as to the elected. It is accordingly admitted, even by Sir George M'Kenzie, in a supplement to his work, 'that, by the constant course of posterior acts of parliament concerning elections, and representatives of shires in parliament, and 'by the constant custom acknowledged both by King and parliament,



'ment, none can represent shires in parliament but such as are actually chosen by the shires whom they represent.'

How plain and simple soever the plan of electing commissioners from shires, that was laid down by this statute, might then appear, it should seem that several questions arose with regard to the right of voting in these elections. To prevent such questions in time to come, it was declared by the act 1661, cap. 35. that, besides all heritors who held a forty shilling land of the King *in capite*, all heritors, liferenters, and wadsetters, holding of the King, and whose yearly rent amounted to ten chalders of victual, or L. 1000, all feu-duties being deducted, should be capable of electing, or being elected.

To discover whether a person was truly possessed of ten chalders of victual, or L. 1000 Scots of free rent, might, however, often be a matter of some difficulty; of course, many questions would still arise with regard to the right of voting, and much time would be consumed in parliament by trying the merits of controverted elections. A new statute was therefore made about twenty years after, 1681, cap. 21. by which a variety of rules were laid down for regulating the elections of commissioners from shires.

By this act, it was, in the *first* place, declared, that none should have a right to vote but those who, at the time, stood publicly infest in property or superiority, and were in possession of a forty shilling land of old extent, holding of the King or of the Prince, distinct from the feu-duties in feu-lands, or (where the old extent did not appear) stood infest in lands liable in public burdens, for his Majesty's supplies, for L. 400 of valued rent \*, whether such lands had

\* Some years before this act passed, a new valuation had been made of all the lands in



had formerly been church lands, and as such then held of the King, or whether they had originally held feu, ward, or blench, of his Majesty, as King or Prince of Scotland \*

This act next declared, that apprisers or adjudgers should have no vote during the legal reversion; but that the heritor (owner of the land) should continue to vote himself; and that, upon the expiration thereof, the appriser or adjudger first infest should alone be entitled to vote till the shares of the several adjudgers should be divided, when their respective extents or valuations would appear †.

It likewise allowed the privilege of voting to all proper wadsetters ‡ of lands, of the holding and extent, or valuation, above mentioned, in Scotland, for the purpose of proportioning the land-tax. Thence arose the distinction betwixt valued rent and old extent, both of which will be explained in the sequel.

\* In the reign of Robert III. sundry lands, lying mostly in the shires of Ayr, Renfrew, Bute, and Ross, were granted by the crown as an appanage, or patrimony, to the King's eldest son, then called *the Prince of Scotland*. These lands were erected into a regality, called the *Principality*. And, by an act of James IV. 1489, cap. 16. the free tenants of the Prince were ordered to give suit and presence in parliament, until the King should have a son to answer for them therein. Hence all who held of the Prince were allowed to vote in the election of commissioners from shires; and the same practice takes place still, whether there be a Prince existing at the time or not.

† An apprising, or adjudication, is a decree of the proper court, adjudging the estate of a debtor to belong to his creditor (who is called the *appriser* or *adjudger*) in payment of the debt due to him. The debtor has an equity of redemption (called the *legal reversion*) by paying the debt within ten years. During that period, the right of the creditor is no more than a security or mortgage. The debtor remains proprietor, but, after the lapse of ten years, he has it not in his power, by making payment of the debt, to recover his estate, which then becomes the property of the creditor.

‡ A proper wadset, in the law of Scotland, is a right much of the same nature with



tioned, to apparent heirs in possession, by virtue of their predecessors infestment, to liferenters, and to husbands for the freeholds of their wives, or as having right to a liferent by the courtesy; but, at the same time, declared, that the *fiar* (tenant in fee) and liferenter should not both vote at the same time upon the same lands; and that no person who was infest for relief or payment of money, should have a right to vote in consequence of such infestment.

By the same statute, the freeholders of the several shires were appointed to meet at their respective head boroughs upon the first Tuesday of May, then next, for the purpose of making up a roll containing the names and designations (*i. e.* additions) of all the *fiars*, liferenters, or husbands having a right to vote, and expressing their respective extents or valuations; and to meet at the Michaelmas head court yearly, in time to come, in order to revise that roll, and to make such alterations upon it as might occur from time to time; after which it was ordered to be inserted in the books of the sheriff, or steward of the county.

This act likewise appointed the freeholders to hold their meetings for electing commissioners (whether at the Michaelmas head court, or at the calling of parliaments or conventions) in the sheriff or steward court room; and it farther ordered, that the first or second commissioner last elected, or, in their absence, the sheriff or steward clerk, should ask the votes of the freeholders for the choice of a preses and clerk to the meeting; that, in case any alteration had happened in the roll since the last meeting, the persons then coming to have  
right

a Welsh mortgage. The wadsetter or mortgagee enters to the possession of the lands, which can only be recovered from him by rendering payment of the money lent; and, in lieu of interest, he takes his hazard of the rents, or profits of the land, for no part whereof, how considerable soever they may be, is he liable to account to the proprietor or mortgager, who, in the language of the law of Scotland, is called the *reverser*.



right to vote should be inserted in it; and that no objection should be admitted against any person who stood upon it, unless it were moved before the freeholders began to vote in the election of their commissioners.

This act also ascertained in what manner the objections made to the votes of any of the freeholders were to be ultimately discussed. They were to be stated in an instrument, and to be judged of by the parliament or convention, if then sitting \*; and, in case there were no parliament or convention at the time, the meeting was to appoint a particular diet, at which the parties were to be warned to attend the Court of Session, who were empowered to determine the matter summarily †, and according to law.

It was farther provided by this statute, that, if the persons objected to should appear at the parliament, or convention, and establish their right to vote, the objectors should pay their costs, and be fined in 500 merks; and if, on the other hand, the objections should be sustained, the objectors were to be allowed costs, and the party objected to was to be fined in the like sum.

It was likewise declared that non-residence should be no objection ‡, but that minority, or the neglecting to take the test, (an oath

\* The parliament of Scotland was wont to appoint a committee for determining controverted elections; and sometimes both candidates were rejected, and a new election ordered. See *Fount.* vol. 1. pag. 149. 413. This committee continued during the whole parliament. But, sometimes, these controverted elections were tried in the parliament itself, without being sent to the committee. The difference betwixt a parliament and a convention will be explained in the sequel.

† That is, expeditiously, and without abiding the course of the usual forms of court.

† This had been previously fixed by a resolution of the parliament, upon the 26th of October 1669, which is to be found in the Appendix, No. 14.



against Popery, and asserting the King's supremacy, appointed by the 6th act of the same session), should be sufficient to disqualify from voting.

From this act, down to the time of the Union, the law suffered no alteration with regard to the election of commissioners from shires, except one, which was introduced by a statute of King William, 1698, cap. 22. declaring, that no person, during the currency of a protection from diligence \*, should be capable to choose, or to be chosen, a member of parliament, without previously renouncing the benefit of such protection.

It is, however, to be observed, that, besides the representatives of counties and boroughs, the great officers of state were members of the Scottish parliament *ex officio*. When this was first introduced is unknown; but, in the parliament 1617, as shall be more particularly mentioned in the sequel, it was fixed, that, from that time, eight of these officers only should be entitled to a seat, viz. the High Treasurer, the Treasurer Depute, the Secretary, the Privy Seal, the Master of Requests, the Clerk Register, the Justice Clerk, and the Advocate. Holding their seats in virtue of their offices alone, it was understood that they neither could elect nor be elected: And the Justice Clerk and the King's Advocate having voted in an election for the county of Mid Lothian in 1675, Fountainhall observes †, 'that they should  
' not have voted, because, being officers of state, they were not  
' capable to be elected; and to elect, and be elected, sunt correlata  
' quorum uno sublato tollitur et alterum.' In the year 1703, when Sir James Murray of Philiphaugh, one of the commissioners for the shire of Selkirk, was appointed Lord Clerk Register, a writ issued  
for

\* A protection against being arrested and imprisoned at the suit of creditors.

† Vol. 1. page 352.



for electing a new representative in his room. Many similar instances might be given. When any of these offices were put in commission, one of the commissioners was named by the King to sit in parliament.

Having now exhausted what seemed necessary to be here mentioned, with respect to the temporal estates, I proceed to consider the alterations which took place in the parliament of Scotland with regard to the spiritual estate.

It has been already observed, that the reformation, and the abolition of monasteries, occasioned a considerable alteration in the spiritual estate of the English parliament. The Archbishops, however, and the Bishops, still remained members of the House of Lords: But, in Scotland, religion produced at last a more violent effect, by entirely lopping off the ecclesiastical estate in parliament. How that alteration was brought about shall now be explained.

The Protestant Church began to assume a regular form in Scotland about the year 1560. But although the genius of the first reformers tended strongly towards that system which has since prevailed under the name of *Presbyterian*, it was not thoroughly established till after many struggles. Approaching to the Democratical form of civil government, it was not to be favourably received by Monarchs even the most limited, far less by those who ardently wished to extend their prerogative.

Very early attacks were made in the assemblies of the Church upon the order of Bishops \*. In 1581, an act of the assembly passed,  
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\* There were in Scotland twelve Bishops under the two Archbishops of St. Andrews and



fed, declaring the office of Bishop, as then exercised, to have no foundation or warrant in the word of God. This, however, did not prevent a nomination being made the very next year to the See of Glasgow, then become vacant. And in 1584, Mr Andrew Melvil, one of the ablest enemies of the hierarchy, was summoned before the privy council, on account of his having complained loudly of the grievances of the nation, in a sermon he preached at St Andrews, and was obliged to fly to England in order to avoid punishment \*. Severe laws were likewise made in the same year, with a view to restrain the leaders of the Church, and all those who aimed at the abolition of Episcopacy. The attempting to diminish the rights and privileges of any of the three estates, was declared high treason †; and the holding councils, conventions, or assemblies, to treat, consult, and determine, in any matter of state, civil or ecclesiastical, without the King's special command or permission, was forbid under the most severe sanction ‡.

These laws did not, however, subdue the spirit and zeal of the Presbyterian leaders. In 1586, the provincial synod of Fife summoned Adamson, the Archbishop of St Andrews, to appear before them, and answer for his contempt of the decrees of former general assemblies, in exercising the function of a Bishop; and, notwithstanding his refusing to acknowledge the jurisdiction of the court, and his appealing to the King, a sentence of excommunication was pronounced

and Glasgow. St Andrews had for suffragans the Bishops of Edinburgh, Dumblain, Dunkeld, Brechin, Aberdeen, Murray, Ross, Caithness, and Orkney; and Glasgow those of Galloway, Argyle, and the Isles. There were likewise twenty-seven abbacies, and thirteen priories; *Balfour, page 34.*

\* Spottiswood's History, page 330.

† 1584, cap. 130.

‡ 1584, cap. 131.



nounced against him. A general assembly, held soon after, entered warmly into the views of this synod ; and it was with difficulty the King obtained an act permitting the name and office of a Bishop. The power of the order was greatly reduced. They became little better than perpetual moderators of presbyteries. They were declared to be subject, like other pastors, to the jurisdiction of the general assembly ; and Adamson, the Primate, renounced all claim to supremacy over the Church, and promised to demean himself suitably to the character of a Bishop, as described by St Paul \*.

In 1587, James VI. came of age ; and, in the Parliament which was then summoned, a law passed that threatened a deadly blow to the ecclesiastical state. The public revenue being inconsiderable, and the administration of government growing daily more expensive, it became necessary to provide some new fund to answer the exigencies of a Prince who was naturally profuse, and a bad oeconomist. The ancient patrimony of the Church had suffered greatly by the depredations of the laity since the Reformation ; but what still remained was very considerable, and was either held by the Bishops who possessed benefices, or by laymen, in consequence of grants during pleasure. It seems to have occurred to the King and his ministers, that, from this source, a supply might be drawn, without imposing any tax upon the people ; and the temper of the nation at the time assured them, that the measure would be nowise unpopular. An act, therefore, passed in the parliament of that year †, by which the lands that then belonged to any archbishop, bishop, abbot, prior, prioress, or any prelate whatsoever, or to any abbay, convent, or cloister of friars, nuns, monks, or canons, prebendary or chaplainry, or chapters of cathedral churches, or chantry colleges, were annex-  
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\* Doctor Robertson's History of Scotland, vol. 2. page 119.

† 1587, cap. 29.



ed to the Crown, and the King was impowered to apply the rents to his own use; with an exception, however, of the tythes belonging to parsonages or vicarages, which were to remain with the persons serving the cure, together with the mansion-houses, and a few acres of land by way of glebe; and also reserving to all Archbishops, Bishops, Priors, Commendators, and other possessors of great benefices of the estate of Prelates who had a vote in parliament, their principal castles and mansion-houses, with the buildings and yards thereof, lying within the precincts and inclosures of their places, which were to remain with them and their successors, for their residence and habitation.

In 1592, the Presbyterian government by general assemblies, synods, presbyteries, and sessions, was approved of in parliament\*; the acts that had passed against the Church in 1584 were rescinded or explained; and all presentations to benefices were ordered to be directed to the particular presbyteries, for the giving of collation.

These acts did not, however, totally annihilate the Prelates, or put an end to that branch of the three estates. They still enjoyed the right to sit in parliament; but, deprived of their revenues, they became not a little contemptible, and were unable to bear the expence of their rank, or of attending the great council of the nation. This James did not relish. Besides his natural repugnance to a system that was little suited to his exalted notions of royal prerogative, he could not fail to see that the influence of the crown would be greatly diminished by the total abolition of the ecclesiastical estate. He therefore ardently wished to support Episcopacy; but the prejudices which the nation, in general, had conceived against the name and character of Bishops were so violent, that he durst not for some time

\* 1592, cap. 116.



time avow his intentions. He went therefore to work in a more cautious manner. In 1597 he prevailed with the commission \* that had been appointed by the last general assembly, to complain to parliament that the Church was the only body in the kingdom destitute of representatives, and to crave that a competent number of the clergy might be admitted to a seat, according to ancient custom †. In consequence of this application an act passed ‡, ordaining that the pastors and ministers, on whom his Majesty should at any time confer the office, place, title, and dignity of a Bishop, Abbot, or other Prelate, should have a vote in parliament, and that all the bishoprics then vacant, or to become vacant, should be bestowed only upon actual preachers and ministers of the Church. But, in order to prevent jealousy, it was, by the same act, remitted to the King to advise and agree with the general assembly, what authority those upon whom bishoprics might be bestowed, should have in the spiritual policy and government of the Church.

This act was far from giving general satisfaction to the clergy. Though calculated to reflect lustre upon their order, they were willing to sacrifice every consideration of interest and ambition to their abhorrence of Episcopacy. The general assembly was, however, at last prevailed with, after much debate and opposition, to declare, in March 1598, that it was lawful for ministers to accept of a seat in parliament; that it would be beneficial to the Church to have its representatives in that body; and that fifty-one persons (a  
number

\* The commission is a committee named by the general assembly to finish the business they cannot overtake during their own sitting, and to attend to the interest of the Church.

† Spottiswood, 450.

‡ 1597, cap. 235.



number nearly equal to that of the old spiritual estate) should be chosen from among the clergy for that purpose \*.

The manner of electing these representatives, and the authority they were to enjoy, were not fixed till the beginning of the year 1600, when a general assembly was held at Montrose, in which, notwithstanding all the address the King employed to acquire a majority, he with difficulty got the following regulations agreed to: That the general assembly should recommend six persons to every vacant benefice that gave a title to a seat in parliament, out of whom the King should name one: That the person to be so named should neither propose nor consent to any thing in parliament that might affect the interest of the Church, without special instructions to that effect: That he should be answerable for his conduct to the general assembly, and submit to its censure, under the pain of excommunication: That he should discharge the duties of a pastor in a particular congregation, and usurp no ecclesiastical jurisdiction over his brethren: That, if the Church inflicted on him a sentence of deprivation, he should thereby forfeit his seat in parliament: And that he should annually resign his commission to the general assembly, to be restored or not, as the assembly, with the approbation of the King, should think most for the good of the Church †.

These regulations, however, did not take place. James succeeded in a few years to the crown of England, which added much to his authority and influence in Scotland; and, in 1606, he found himself enabled to obtain the sanction of parliament to the restitution of the order of Bishops, and to a repeal of the act of annexation, in so far

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\* Spottiswood, 450. Calderwood's manuscript History of Scotland, vol. 5. pag. 278.

† Spottiswood, 453. 457. Calderwood, vol. 5. pag. 368.



as it related to their benefices \*. Nor did he stop there; another act passed in 1609 †, restoring to Archbishops and Bishops their former jurisdiction, especially the jurisdiction of commissariots, and the power of administering justice, by commissaries, within their respective dioceses. Their powers were still farther enlarged by an act in 1612 ‡; and, in 1617 ||, all the deans, and other members of the chapters of cathedrals, were restored to their manſes, glebes, rents, and other patrimony.

In this manner did James bring about his scheme of restoring Episcopacy. He indeed wanted to go still farther, and to reduce the Church of Scotland to the same form, in every respect, with the church of England. That, however, he lived not to accomplish; and his successor, Charles I. treading too precipitately in his father's footsteps, and pressing too eagerly the reception of the liturgy, and the observance of ceremonies, to which the Scottish nation was in general averſe, he thereby kindled the flames of civil war, the consequences of which were fatal to his designs, and obliged him, in 1640, to consent to ſeveral acts of parliament entirely abolishing the Episcopal form of Church government, and excluding all Archbishops, Bishops, and other prelates, from a ſeat in parliament, which was then declared to conſiſt of the nobility, barons, and burgeſſes.

This alteration upon the conſtitution of parliament, by lopping off one of the three eſtates, was not, however, at that time of long continuance. Episcopacy returned upon the reſtoration of the monarchy; and, by an act of the ſecond ſeſſion of the firſt parliament

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of

\* 1606, cap. 2.

† 1609, cap. 6.

‡ 1612, cap. 1.

|| 1617, cap. 1. 2.



of Charles II. \*, setting forth, in strong terms, that it was an inherent right of the crown, by virtue of the King's prerogative and supremacy in causes ecclesiastical, to order and dispose of the external government and polity of the Church; the archbishops and bishops were restored to their ancient place and privilege in parliament, and to the full exercise of their Episcopal functions, precedence in the Church, power of ordination and inflicting of censures, and all other acts of Church discipline †.

The national aversion from Episcopacy was, however, too deeply rooted, and too violent, to be easily destroyed. It was the cause of many commotions during the reign of Charles II. and was fostered by the arbitrary proceedings of his successor, and the eager desire that superstitious Prince discovered to introduce Popery. No sooner, therefore, was a period put to his government, than an abhorrence of Prelacy was publicly avowed, and the Episcopal form of Church government declared to be a great and unsupportable grievance. This was

\* 1662, cap. 1.

† It may here be observed, that the archbishops and bishops were brought into parliament before the statute restoring them to their seats had passed. The parliament met upon the 8th of May 1662, and they were that day received; but the act in their favour, though the first in the list of the printed acts of the session, passed not till the 27th of that month. An order of parliament, indeed, issued for sending for them; and Bishop Burnet gives the following account of their introduction: 'The session of parliament came on in April 1662, when the first thing that was proposed by the Earl of Middleton was, that, since the act rescissory had annulled all the parliaments after that held in the year 1633, the former laws in favour of Episcopacy were now again in force; the King had restored that function which had been so long glorious in the Church, and for which his blessed father had suffered so much; and though the Bishops had a right to come and take their place in parliament, yet it was a piece of respect to send some of every state to invite them to come and sit among them. This was agreed to: So upon the message the Bishops came and took their places;'

vol. 1. page 143.



was done in the most explicit terms by the 13th act of the meeting of the estates in 1689, which contains the claim of right and the offer of the crown to William and Mary; and, in consequence of that declaration, an act passed in the first parliament held under their authority, abolishing Prelacy, and all superiority of office in the Church above presbyters \*. This act was soon followed by another †, restoring to their benefices those ministers who, during the two former reigns, had been deprived or banished for not conforming to Prelacy; and, in the same session, a third act passed ‡, confirming the Presbyterian Church government by kirk-sessions, presbyteries, provincial synods, and general assemblies, and repealing all former statutes that were prejudicial to, or inconsistent with that plan.

Thus, at last, an end was put to the estate of the clergy in the Scottish parliament; and from that time, down to the Union of the two kingdoms, the three estates were composed of the temporal peers, the officers of state, the barons, or commissioners from shires, and the burghs. Nor did any other alteration in the constitution of parliament take place, except that, in the same year, 1690, the committee, known by the name of the *Lords of the Articles*, (of which in the next section) was suppressed §, and some of the larger shires were, as has been already mentioned, allowed to elect an additional number of representatives ||.

K 2.

Before

\* 1689, cap. 3.

† 1690, cap. 2.

‡ 1690, cap. 5.

§ 1690, cap. 3.

|| 1690, cap. 11: This statute increased the number of the representatives of shires from 64 to 90. The number of the representatives of boroughs was then 66, viz. two from Edinburgh, and one from every other borough. The borough of Campbeltown had not been then erected.



Before concluding this section, it will not be improper to state shortly the way and manner in which the different estates were summoned to the parliaments of Scotland, and the endurance of these parliaments at different periods.

We have seen, that, by the great charter of King John of England, the prelates, and great barons or peers, were to be summoned singly by the King's letters, and that all the other small barons, who held *in capite*, were to be summoned in general, or edictally, by the sheriffs and bailiffs, in consequence of writs directed to them: But, when a representation both of the small barons and of the boroughs was introduced, the writs to the sheriffs came to be more special, ordering them to return two knights of the shire, and two burgessees out of each borough within their several counties, as is practised at this day.

How the different estates were summoned to the parliament of Scotland in more ancient times, we know not; but it was ordered, by the act 1427, cap. 101. that all bishops, abbots, priors, Dukes, Earls, Lords of Parliament, and barons, should be summoned by the King's special precepts; and as, by the same statute, James I. intended to introduce a representation of the small barons, it is to be supposed that they were to be summoned edictally, in consequence of brieves, or writs, issued from the Chancery to the sheriffs of the several counties: And, although this intended alteration upon the constitution of parliament did not then take place, we know that it was the practice to issue general writs to sheriffs and bailiffs to summon prelates, peers, freeholders, and commissioners from boroughs, and likewise to send special precepts to each of the prelates and peers, or great barons. This we learn from an order of James III. entered in the records of parliament on the 21st of February 1487, in the following words: ' We do you to wit, that our  
' Sovereign



‘Sovereign Lord, by the advice of his council, has, for certain reasonable and great causes, deserted and dissolved his parliament that was continued of before to the 5th of May next to come, and has ordained a new general parliament to be set and proclaimed to be holden at Edinburgh the 12th day of May next to come, with continuation of days; and general precepts, to pass to all Lords, prelates, barons, freeholders, and commissaries; and with special letters under his signet to all the prelates and great Lords of his realm, to shew and declare to them the cause of the fitting of his said parliament.’ Copies of the order to Chancery to issue writs, or precepts, to the sheriffs, &c.; and of these precepts, and likewise of the special precepts to the prelates and peers, are inserted in the Appendix, No.’s 15. 16. 17. and 18.

The author of the Essays on British Antiquities supposes, that the special letters to the prelates and great Lords had gone into disuse before 1587, because, by the act of that year, establishing the representation of the small barons, it was enacted, ‘That the said commissioners be warned at the first by virtue of precepts forth of the Chancellary, or by his hiennesse missive letters or charges, and in all times thereafter by precepts of the Chancellary, as shall be directed to the other estates.’ But this does not seem to be a necessary conclusion. It does, however, appear, that, at last, even the general precepts from the Chancery had been dropped, and that parliaments came to be called only by proclamation\*.

When, through a neglect to elect commissioners at Michaelmas, or from any other cause, it became necessary to choose them upon the approach of a parliament, the diet for election appears to have been fixed by the sheriff. Upon the 7th of July 1681, the privy council,

\* A copy of such proclamation is inserted in the Appendix, No. 19.



council, in consequence of a complaint from some of the freeholders of Berwickshire, that the sheriff intended to surprise them in electing their commissioners, by giving only one day's notice, found that the sheriff only, and not the council, could fix the diet of election; but they, at the same time, ordered the sheriff to give at least six days notice, that the freeholders might have time and leisure to assemble; and that the notice should be given at the head borough of the shire, by proclamation over the market cross, and by tuck of drum through the town \*. The act 1681, cap. 21. had not then passed; but it was thereby enacted as follows: 'And to the effect that sufficient  
' advertisement may be given to all parties having vote in elections,  
' who are to elect at the calling of a parliament or convention, the  
' sheriffs and stewarts are hereby ordained to make publication of  
' the call and diet of the said parliament and convention, and of the  
' diet appointed for election, and that at the head borough of the  
' shire or stewartry, upon a market day, betwixt ten and twelve in  
' the forenoon: And also, shall make the like intimation at each  
' parish kirk on Sunday immediately thereafter; which diets for  
' election shall at least be twelve days before the meeting of parlia-  
' ment, or eight days before the meeting of a convention, that the  
' commissioners elected may have sufficiency of time to keep the diet  
' of the parliament or convention.'

When a vacancy happened during the sitting of parliament, an order for a new election issued in the name of the Sovereign, or his commissioner, and of the estates of parliament. It was customary to name the diet of election in this order †.

Till the reign of Charles I. the parliaments in Scotland, though exceedingly frequent, were never of long endurance. To use the present

\* Fountainhall, vol. 1. page 146.

† Copies of such orders are inserted in the Appendix, No. 20.



present parliamentary language, they lasted only one session. We indeed meet with a few instances of their being continued (adjourned) to a distant day in the reign of James I. but they did not always meet again at the appointed time. They were to be summoned a certain number of days preceding those to which they were adjourned; and if that was neglected, the adjournment became equal to a dissolution \*. It was even an object to shorten, as much as possible, the period of the sitting of parliament; and, on that account, it was not infrequent to remit business of the greatest importance to select committees, and to declare the determinations or resolutions of such committees to be equally binding as if passed in full parliament. One remarkable instance in the time of James III. has already been taken notice of, and many more might be given; but the following will suffice. In the seventh parliament of James VI. *anno* 1581, certain persons were named to consider such articles as could not be overtaken during its sitting, and to pass acts concerning them, which were to be equally valid and obligatory as if passed in parliament. In the eleventh parliament of the same Prince, *anno* 1587, power was given to certain persons of each estate 'to treat, consult, deliberate, and conclude, upon such taxation as shall be thought expedient

\* In 1683, the parliament should have met upon the 17th of July, but no meeting was then held, nor was there any previous prorogation. It was, however, afterwards prorogued, by a letter from the King, to the 6th of December; upon which Fountainhall has made the following remark, vol. 1. page 238. 'It was doubted if it was not extinct by suffering the day to pass without meeting, or a new prorogation then. It was mere forgetfulness; but this may yield a cavil to question what may hereafter be acted in this parliament.' Sir George M'Kenzie, in his Observations, page 411. says, 'It was doubted whether, if the day to which the parliament was adjourned by proclamation was elapsed, a new parliament behoved to be called, or if the current parliament ought to be adjourned by a new proclamation, notwithstanding the day was elapsed; and it was found that it might be adjourned, since the power of calling and dissolving parliaments is the King's prerogative. And a letter to this purpose, from the King, is registrated in the council books in July 1683.'



'dient to be levied off the subjects, and of the manner and execution that shall be directed to that effect.' And, in the same year, a committee was named 'for setting off the order of the taxation on all estates,' whose decrees or resolutions were to be equally binding as if passed in parliament.

The shortness of the parliaments in those days was indeed most consistent with the enactment of the statute 1587, cap. 114. by which the small barons were appointed to elect their commissioners or representatives yearly at Michaelmas. But a surprising alteration took place in the course of half a century after the date of that act. By the 39th act of the second parliament of Charles I. which met in June 1640, in consequence of that Prince's proclamation, although neither he, nor any commissioner for him, then appeared, the estates did, of their own authority, continue the parliament to the 19th of November then next. It accordingly met on that day, and was again continued by the same authority to the 14th of January 1641. Several other continuations or adjournments took place afterwards; and no material business was entered upon till the month of August 1641, when the King himself was present. By the 17th act of the first session of this parliament, it was enacted, that a parliament should be held once in every three years, and that the time and place of meeting of each new parliament should be appointed by the King, or his commissioner, and the estates, before the close of the preceding parliament, and by the last act thereof. It was accordingly ordered by the last act of this second parliament of Charles I. that a new parliament should be held upon the first Tuesday of June 1644, without prejudice, however, to his Majesty to appoint an earlier diet if he should think it fit to do so. The estates, consisting then of the nobility, barons, and burgessees, accordingly met upon the 4th of June 1644, and, by their own authority, continued that parliament from time to time, so as to make it consist of no less than six sessions, the last of



of which terminated on the 27th of March 1647, when a new triennial parliament was ordered to be held upon the first Tuesday of March 1648. This parliament met upon that day, and consisted of three sessions. The last ended on the 7th of August 1649. A fourth was then appointed to commence upon the first Tuesday of March 1650; but before that day arrived, an important revolution had taken place, which put an end to all parliaments in Scotland till the restoration of Charles II. The first parliament of that Prince consisted of three sessions. At the close of each of the two first, it was adjourned to a certain day; and the acts of adjournment, or prorogation, were thus expressed: 'The King's Majesty declares this parliament current, and adjourns the same to the            day of  
' next to come; ordaining all members of parliament, noblemen,  
' commissioners from shires and boroughs, and all others having interest, to attend that day; and that there be no new elections in  
' shires or boroughs, except upon the death of any of the present  
' commissioners.' The same practice was observed down to the Union of the two kingdoms: And the parliament held under the authority of William and Mary consisted of no less than nine sessions, having been continued, by adjournments from time to time, not only during the life of Mary, but even during the whole period of William's reign, and a part of that of Queen Anne. The act for triennial parliaments had been rescinded at the restoration; and there was no limited period beyond which the same parliament might not subsist. This was, however, a defect in the constitution, as it enabled the crown to maintain, as long as it pleased, the authority of a parliament favourable to its views, and to prevent the nation from putting a stop to an unconstitutional extension of the royal prerogative, by electing representatives more attentive to the true interest and the liberties of the people.



## SECTION III.

*Of the most remarkable Differences between the two Parliaments of England and Scotland.*

HAVING thus given a general view of the constitution of the parliament of each kingdom down to the time of the Union, it will not be improper to look back a little, and consider in what points they chiefly differed.

We have already seen, that, soon after the introduction of representatives from shires and boroughs, the English parliament was divided into two separate houses, the Lords and the Commons; but, in Scotland, the three estates met always in one house, had one common president, and deliberated jointly upon all matters that came before them, whether of a judicial or of a legislative nature.

It has, however, been doubted whether a bill could pass into a law, or a tax could be imposed, if any one of the three estates entered a dissent. Craig seems to have been clearly of opinion that each had a negative. His words are: ‘Sed de parliamentis hoc  
‘unum monuisse sufficiat, nihil ratum esse, nihil legis vim habere,  
‘nisi quod omnium trium ordinum consensu conjuncto constitutum  
‘est; ita tamen ut uniuscujusque ordinis per se major pars consen-  
‘tiens pro toto ordine sufficiat. Scio hodie controversi, an duo or-  
‘dines parliamenti, dissentiente tertio, quasi major pars, leges con-  
‘dere, onera sive realia sive personalia imponere, statuta nova in-  
‘troducere possint; cujus partem negantem boni omnes, et quicun-  
‘que



‘ que de hac re scripserunt, pertinacissime tuentur, alioqui duo ordi-  
 ‘ nes in everfionem tertii possint consentire. Quod de everfione dixi,  
 ‘ idem de praejudicio et incommodo intelligendum \*.’ Sir George  
 M’Kenzie, on the other hand, embraces the opposite opinion, in his  
 Observations upon the act 1663, cap. 24. †, where he expresses him-  
 self as follows: ‘ The Bishops having consented, by this act, to the  
 ‘ imposition upon themselves in favour of universities, it is declared,  
 ‘ *that this act shall be no preparative for laying on any burden upon*  
 ‘ *the clergy hereafter, without their own consent.* From which it  
 ‘ may be argued, that, though all the rest of the parliament should  
 ‘ consent to an imposition upon the clergy, yet that could not be  
 ‘ valid, except themselves consented to it, though the imposition  
 ‘ were carried by plurality of votes: But this inference is not con-  
 ‘ cluding; for the parliament is a collective body, composed of the  
 ‘ King and the three estates, in which the major part determines the  
 ‘ rest; and if this were granted to the clergy, they being but a third  
 ‘ estate, every one of the other two estates might pretend the like,  
 ‘ and so each estate would have a negative as well as the King;  
 ‘ whereas, not only Craig has determined that the parliament may  
 ‘ make an act without the consent of any one of the states, having  
 ‘ stated this question expressly; but we see, that the boroughs having  
 ‘ unanimously dissented from the fifth act of the third session of the  
 ‘ second parliament, concerning the privileges of boroughs royal ‡,  
 ‘ the same was notwithstanding passed in parliament; and we all re-  
 ‘ member the memorable story of the boroughs rising, and leaving  
 ‘ the rebellious parliaments 1649, before the parliament passed the  
 ‘ act for *allowing the value of annualrents*, whereupon a wor-  
 L 2 ‘ thy

\* Craig de Feudis, lib. 1. dig. 7. § 11.

† Page 424.

‡ The act here referred to is 1672, cap. 5.



'thy Peer said, that, *since they had sitten so long without the head, they might well enough sit without the tail.*' Sir George's opinion seems to be more consistent with the circumstance of the three estates sitting and deliberating together in one house, and is also confirmed by the facts he refers to; but it is surprising that he should quote Craig as an authority, when his opinion was the very reverse. Keith says, that, in 1542-3, an act passed, allowing the Bible to be read in the vulgar tongue, although a dissent was entered by all the prelates \*. Calderwood, in speaking of the parliament 1621, mentions, that, in calling and marking the votes, the distinction of the three several estates was not regarded, but the names called promiscuously, and the resolutions made according to the majority of voices †. We also learn from Fountainhall's account of the parliament 1686, that a plurality of votes carried the question, without attending to the distinction of estates ‡. Craig's opinion seems to have been altogether theoretical, upon a case which probably seldom had occurred. He accordingly states no facts in support of that opinion, and quotes no particular authority ||.

But, even although each of the three estates had been, in this respect, constitutionally independent on one another, and had enjoyed

\* Page 36. Keith's account of this act is inserted in the Appendix, No. 21.

† Calderwood's History of the Church of Scotland, page 779.

‡ Fountainhall, vol. 1. page 417.

|| In England, the Spiritual Lords are, in the eye of law, a distinct estate from the Lords Temporal, but, in practice, they are blended together under the one name of *the Lords*; they intermix in their votes; and the majority binds both estates. They, therefore, in every effectual sense, form but one estate, although the ancient distinction between them still nominally continues. A bill may accordingly pass in the house of Peers although every Spiritual Lord vote against it; and, in like manner, it may be carried through that house by the voices of the Lords Spiritual alone, if they constitute the majority, although every one of the Temporal Lords present should vote for rejecting it. See *Blackstone*, vol. 1. page 156.



ed a negative, yet, by their meeting together in one assembly, the power and influence of the commons would naturally be kept under much longer in Scotland than in England, where they, at an early period, met in a separate house, and had their own speaker or president. In a country where there was little commerce or industry, and, of course, little wealth, exclusive of landed property, the burghesses, and even the small barons, would feel the humbleness of their situation, and be unfit to cope with high spirited nobles, and dignified churchmen, who were possessed of great estates and large revenues. We accordingly find, that, for a long time, few of the small barons gave themselves the trouble of attending, or even of sending commissioners to parliament. It was the religious disputes which took place at the Reformation, and during the long contest between the Episcopal and Presbyterian parties, and the zeal of the preachers, that first diffused the spirit of true liberty amongst the body of the people; but it was not till the Revolution that they met with that attention from government which the rights and privileges of free citizens demanded.

The constitution of the Scottish parliament differed from that of the English in another material point. In the former, a committee was named at the commencement of each parliament to prepare matters, and to digest the bills that were to be brought in; and it came at last to be the general practice to lay no business before the parliament without its being previously considered in that committee \*.

It

\* I use the words *general practice*, because instances occur of petitions being presented to parliament without going first to the committee of articles. Fountainhall mentions one in the parliament 1601. ' Lord Bargenny presented a petition in plain parliament, ' (so that it is not absolutely necessary to go first to the articles), which was read there, ' and referred to the articles,' &c. See *vol. 1. page 150*. The same author is more full upon this point in the next page. His words are: ' At the opening of the parliament, it was *mordicus* contended by the court faction, that nothing could be tabled in ' parliament.



It is uncertain when this select committee, which was known by the name of *the Lords of the Articles*, was first brought in. Sir

David

parliament till first it was brought into the articles; which seems to agree with the 218th act of the parliament 1594, and the act made in June 1663; but see a Discourse, proving that this is a late innovation, destructive of the liberty and of the powers of the parliament; and it is thought our parliaments will never be free of prelimitation till that form of the articles now used be rectified. They met ordinarily before the parliament sat, and caused the body of the parliament, their constituents, attend them an hour or two, looking one to another. It is true they waited also for his Royal Highness, the Commissioner, who never appointed an afternoon's meeting, but all at ten in the morning; and sometimes they sat till two, three, or four, and the day the test was voted, till six at night; and then, by surprise, affairs and acts were brought in upon the parliament, past in articles that morning, and very seldom delayed, but put to a vote that same diet, that they might not have leisure to prepare themselves for arguing, nor to deliberate, combine, or take joint measures, which renders many of our acts so raw and undigested. See *alibi* of the Roman *Triduum* in making their acts, and of the English custom in their parliaments, of reading their bills three several times, upon different days, before they pass. But this is the prerogative of the Sovereign, and an advantage he hath got with us over the people his subjects. Another point, also contingent with this, fell *incidenter* to be debated in the parliament; but his Royal Highness shewing his dislike of it, it was waved; and it was this; Whether there could be two negatives, one in the parliament, and another in the articles? Sir George Lockhart contended that his Majesty's negative he had in the parliament (which is not very ancient with us) was sufficient to secure his supremacy, though he had it not in the articles. *2do*, That the articles rejecting a bill ought not to have such a negative as to preclude the parliament from calling for, and considering it if they please: But this was stifled; and it seems not material where the King interposes his negative, whether in the articles or parliament, whether before reasoning or voting, or after them; and it seems less disobliging to do it *in initio*, before the pulse be found. This author likewise gives an instance of the King's commissioner interposing a negative in the committee of articles upon the 14th of June 1686, even in a private cause. At the articles, Pittarrow pressing for a hearing in his affair against Lauderdale, the Earl of Murray commissioner, in favour of Maitland, interposed his negative, and delayed it this session of parliament: This being the first time he had used his negative, Southesk took it so ill that he protested for cost, skaith, and damage; vol. I. page 417. The idea of a negative in a private cause seems not a little absurd; yet,



David Dalrymple observes, that, about the year 1367, committees of parliament, with parliamentary powers, were introduced under the pretence of general conveniency, and that, from them, the institution of the Lords of the Articles appears to have had its origin \*. And that it was at least as ancient as the beginning of the reign of James I. seems to be evident from the title prefixed to the acts of that Prince's first parliament, as it stands in the edition in Saxon character, commonly known by the name of the *Black Acts*, and published by authority of Queen Mary, which, after mentioning the date of the holding of the parliament, proceeds thus: 'Con-

yet, from the instances here given, it appears to have been claimed and admitted. An other is mentioned by Sir Robert Douglas in his Peerage, page 61. The power and influence of the crown had indeed at that time arrived at the utmost pitch; and, were we to take our idea of the constitution from a great lawyer, Sir George M'Kenzie, we should be apt to consider the parliament as intended more for an ornament to the crown than for the protection of the rights of the people.

Bishop Burnet tells us, that, in the last session of the second parliament of Charles II. a dispute was raised about the Lords of the Articles. The passage is as follows: 'Next session of parliament new complaints were offered. Duke Lauderdale said, these ought to be made first to the Lords of the Articles, to whom all petitions and motions ought to be made first; and that they were the only judges what matters were fit to be brought into parliament. The other side said, they were only a committee of parliament to put motions into the form of acts; but that the parliament had still an entire authority to examine into the state of the nation. In this debate they had the reason of things on their side: But the words of the act favoured Duke Lauderdale. So he lodged it now where he wished it might be, in a point of prerogative. He valued himself to the King on this, that he had drawn the act that settled the power of the Lords of the Articles; who being all upon the matter named by the King, it was of great concern to maintain that as the check upon factious spirits there, which would be no sooner let go, than the parliament of Scotland would grow as unquiet as a house of commons was in England. That was a consideration which at this time had great weight with the King;' vol. 1. page 364.

\* Annals of Scotland, vol. 2. page 261.



'vocatis tribus regni statibus ibidem congregatis, electae fuerunt  
'certae personae, ad articulos datos per Dominum Regem determi-  
'nandos, data caeteris licentia recedendi \*.'

We have no traces left of any such committee being named in the second parliament; but, in the title prefixed to the third parliament of the same Prince, articles are said to have been put 'be the King  
'to the prelatis, mychtie Lordis of parliament, Erlis, and baronnis,  
'thairto chosen be the thre estatis.' In the fourth parliament no such committee appears; but we learn from the title of the fifth parliament, that the acts then passed 'were tretit and determinit be  
'our Soverane Lord James, be the grace of God King of Scottis,  
'and certane Lordis, prelatis, banrentis, baronis, freehalderis, and  
'wyse men chosin thairto, of the haile counsall of the thre estatis of  
'the realme, in the parliament beginning at Perth,' &c. The sixth parliament is introduced with certain acts made by the whole body, which are all in Latin; but, after these, we find inserted in the record, and in the Black Acts, but omitted by Skeen, a proclamation for publishing the subsequent acts, which are declared to have been passed in a committee that seems to have been named by an intermediate parliament. From that time, I can discover no evidence of  
any

\* From these last words, 'data caeteris licentia recedendi,' we may safely conclude, that, after the election of the committee, the parliament adjourned, at least until the articles referred to the *certae personae electae* were digested, and drawn up in the form of acts: But it is by no means a clear point that this particular parliament ever met again to give the sanction of their authority to these acts. That they were, however, considered to be perfect in form, is apparent from the fourth act of the next parliament, which is thus expressed: 'Item, That it be inquiryt be the  
'King's ministers, gif the statutis made in his first parliament be keipit, and gif they  
'be broken in ony of their punctis, that the brekaris of them be punist after the  
'form and ordinance of the said parliament.' This act, which has been strangely mutilated by Skeen in his edition of the statutes, gives a curious picture of the state of the country, at that period, in point of civilization.



any committee till the eight parliament of James II. when we meet with 'the avifement of the deputis of the thre eftatis touching the 'matter of the money:' And, in the title prefixed to the fourth parliament of James III. we are told, that 'power was committit be the 'hail thre eftatis, to certane perfonis underwritten, to commoun and 'conclude upon the matters after followand,' &c. \*: But ftill we do not find any of thefe committees ftiled by the name of *the Lords of the Articles*, till the reign of James IV. after which they are frequently mentioned in the ftatute book, and appear to have been regularly appointed at the opening of each parliament.

What was the particular mode of electing this committee, or of what number it confifted in more ancient times, is not with certainty known; but, from the quotations already made from the records, it fhould feem, that, during the reigns of at leaft the three firft Princes of the name of James, they were appointed, not by the King, but by the eftates of parliament themfelves; and it is alfo probable that each eftate would name thofe of its own body who were to be upon the committee.

This might be a very harmlefs committee while it continued to be chofen by the different eftates, and was not made to encroach or ufurp upon the proceedings of the parliament itfelf. It was not, indeed, an unnatural institution in a country where, as is obferved by an elegant hiftorian †, the military genius of the ancient nobles,

M

too

\* Thofe perfons were not, however, named by that, but by a former parliament, as appears from the words of the record immediately following the enumeration of the members of this committee. They are, 'Thir matters after followand ar avifit, tretit, 'and concludit, be the perfonis above writtin, in the form as after followis, be virtue of 'the power committit to yame be hale thre eftatis, in the laft parliament halden in 'Edinburgh of before.'

† Doctor Robertfon's Hiftory of Scotland, vol. 1. page 69.



too impatient to submit to the drudgery of civil business, and too impetuous to observe the forms, or to enter into the details necessary in conducting it, made them glad to lay the burden upon a small number, while they themselves had no other labour, than simply to give or refuse their sanction to the bills which were presented to them. 'Anciently (says Bishop Burnet \*) the parliament sat only two days, the first and the last. On the first they chose those who were to sit on the articles, eight for every state. These received all the heads of grievances, or articles, that were brought to them, and formed them into bills as they pleased; and, on the last day of the parliament, these were all read, and were approved of or rejected by the whole body. This was pretended to be done only for the shortening and dispatching of sessions.' This institution came, however, in process of time, to be a great engine in the hands of the crown. The idea being once introduced, that nothing could be brought before parliament but through the medium of the Lords of the Articles, it was only necessary for the King, in order to his getting things managed according to his own wish, or to prevent a disagreeable motion from being made the subject of deliberation in parliament, to secure a majority in this preparatory committee; and that must have been a matter of little difficulty, considering the manner in which, at least in later times, it was named.

History informs us, that, as far back as 1560, the Spiritual Lords chose the Temporal Lords who were to be of this committee; that the temporal chose the spiritual; and that the burgesses chose their members themselves. This is particularly mentioned in the letter above quoted from Thomas Randolph to Sir William Cecil, of the 11th of August 1560, which likewise bears, that it was then agreed to join six of the barons to the committee; but by whom they were named

\* History of his own times, vol. 1. page 115. folio edition.



named the writer of this letter has not informed us. Archbishop Spottiswood concurs with Randolph's account so far as regards the noblemen having the right of electing the clergy, and tells us, that, passing by such amongst them as they knew to be Popishly affected, they made choice of the bishops of Galloway and Argyle, the prior of St Andrews, and the abbots of Aberbrothock, Lindores, Newbottle, and Culrofs; at which the prelates stormed mightily, alleging, that some of them were mere laics, and all of them apostates\*.

This mode of electing the Lords of the Articles must have been favourable to the nation at this particular period, when the chief object was to get free of the tyranny and superstition of the Church of Rome; but it opened a door for extending the influence of the crown, which was made still wider in after times.

By the act 1587, cap. 37. it was appointed, that an equal number of the Lords of the Articles, not under six, nor above ten, should be chosen out of every estate; and, by the 114th act of the same year, it was farther ordered, that an equal number of the commissioners from shires should be upon this committee with the commissioners from boroughs†. But neither of these acts tells us in what manner the members of this committee were to be chosen; whether each estate was to choose its own, or whether the plan that had been adopted in 1560 was to be followed. It is, however, pretty evident that James VI. did not think his influence in parliament sufficiently

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\* Spottiswood, page 149.

† This appears to be a natural consequence of admitting the representatives of the small barons to parliament, which was confirmed by this act, and serves to shew, that, before that period, it was not customary for any of these small barons to be upon the articles, except upon such occasions as that in 1560, when it was taken notice of as a novelty.



ciently secured by the mode of election of the Lords of the Articles which then took place; for, in 1594, he obtained an act \*, by which, under the pretence that inconveniencies frequently arose in parliament, by a multitude of doubtful and informal articles and supplications being presented, it was ordained, that, whenever a parliament should be proclaimed, a convention should be appointed, of four out of each estate, to meet twenty days before the parliament, in order to receive all articles and supplications concerning general laws, or particular causes: That these articles and supplications should be delivered to the Clerk Register, who was appointed to present them to the convention for their consideration, in order that all things reasonable and necessary might be formally made, and presented in a book to the Lords of the Articles at the meeting of parliament; and all impertinent, frivolous, and improper matters, be rejected; and that no article or supplication wanting a special title, or not subscribed by the presenter, should be read or answered in the convention, or following parliament; with power, however, to his Majesty to present such articles as he might think good concerning himself, or the common weal of the realm, at all times. It is remarkable that no provision was made in the act for the choice of this select body, which was to be intrusted with so extraordinary powers; and it is justly observed by an ingenious author †, that this seeming defect was purely an artifice to secure the nomination to the King. They could not be named by parliament, because they were to meet twenty days before it was to sit; the choice, therefore, of course, was to devolve upon the crown ‡.

This

\* 1594, cap. 222.

† Essays on British Antiquities, page 51.

‡ That this was truly the case, is confirmed by the following passage of Calderwood's History, relative to the year 1621, page 759. 'In the beginning of May, or end of April, there



This attempt to give the King a negative before debate, and to restrain, in so high a degree, the active power of parliament, though masked under the artful pretence of preventing frivolous and impertinent matter, could not, after its real tendency came to be discovered, be submitted to by the nation without parting with their privileges altogether. It accordingly appears to have been soon dropped \*; and, in 1621, James fell upon a new device to gain an ascendant in parliament, by getting the Lords of the Articles named in a manner that could not fail of securing him a majority in that preparatory committee.

The Bishops, at all times devoted to the crown, must have been particularly so at that period. It was therefore of little moment who should name the members of their estate that were to be upon the articles. It was of more consequence to the King to be assured of getting

‘ there was a charge published by proclamation at the market cross of Edinburgh, commanding all that had suits, articles, or petitions, to propose to the parliament, to give them into the Clerk Register before the 20th day of May, that by him they may be presented to so many of the council who were appointed by his Majesty, to meet some days before the parliament, and to consider the said bills, petitions, and articles, with certification that the same shall not be received, read, nor voted, in parliament, except they be past under his Highness’ hand. The reason alledged for appointing some councillors to consider the billis, petitions, and articles, before the parliament, was, that diverse persons, partly by ignorance, and partly by fraud, were accustomed, presuming upon the short time of the sitting of the parliament, to give in many billis and articles to those who are appointed to sit upon the same, containing matter prejudicial to the crown, or other good subjects, which, shortness of time and multitude of business, permitted not to be examined, as need were.’

\* This act, however, contributed to suggest the idea so strongly inculcated afterwards, that nothing could be brought into parliament but through the medium of the Lords of the Articles; and Sir George M’Kenzie accordingly tells us, in his Observations, page 290. that it was appealed to in support of that position in the parliament 1674, when it was proposed to appoint a committee of grievances.



getting men to his mind out of the other estates: For this end an ingenious device was contrived: The bishops, as formerly, named eight noblemen, and the noblemen eight bishops; and these sixteen having met together, made choice of eight barons, or commissioners from shires, and of eight burgeses; so that, in effect, the nomination of the whole devolved upon the bishops, on whom the King could rely with confidence \*.

The same plan was followed in 1633, when Charles I. wanted to carry through his favourite scheme of bringing the Church of Scotland to an entire uniformity with the Church of England; and, in order still more to secure the influence of the crown, the officers of state were added †, and the Lord Chancellor was appointed their president.

\* Calderwood, page 775.

† The adding the officers of state to the committee of articles was, however, no innovation. It was an old practice, though when it was first introduced does not with certainty appear. No mention is made of them in the letter from Randolph to Sir William Cecil, at the opening of the parliament 1560; nor have I found them in any of the records of parliament earlier than that of the first parliament of James VI. held in 1567, where the treasurer, the secretary, the privy seal, the clerk register, and the advocate, are mentioned to be upon the articles. In 1581, I find the chancellor, treasurer, secretary, comptroller, and clerk register. In 1592, the same, only the justice clerk instead of the clerk register. In 1607, I find the master of requests, the privy seal, the comptroller, the collector, the justice clerk, and the advocate; and, in 1617, the high treasurer, the treasurer depute, the secretary, the privy seal, the master of requests, the clerk register, the justice clerk, and the advocate. We also learn from the records of this parliament, that it was then fixed that these officers, (being eight in number), and no more, should be upon the articles in time to come. The words of the record are: ‘ A question being moved to his Majesty, anent the number of officers of state who were to have place and vote in parliament and the articles; and after that the clerk register had shewn, out of the registeris of many parliaments, that they have been sometimes more and sometimes fewer than eight, his sacred Majesty, for making the number certain in all time hereafter, was graciously pleased to declare, that in this, and



president. A particular account of the procedure in choosing the Lords of the Articles, at that time, is to be found in the records of the parliament 1633.

The second parliament of Charles I. which met in 1640, was not disposed to follow a precedent so adverse to its own freedom. The people had taken up arms in defence of their religion and liberties, and were unwilling to part with either in an indirect manner. An act accordingly passed \*, declaring that all subsequent parliaments should be at liberty to choose committees for articles, or not, as they might think expedient; that, in the event of their choosing such committees, each estate should name its own members; that all propositions should first be presented to the estates themselves; that the committee for articles should only consult upon the expediency or in expediency of such articles as should be committed to them by the estates, and report their opinion; and that, if they happened to omit making a report as to any of the articles so committed to them, it should be lawful to the presenters of such articles to move them again in parliament. By another act of the same session †, the above mentioned act of James VI. 1594, cap. 222. was expressly repealed, and all grievances, and other matters to be treated in parliament, were ordered to be given in, and presented in full parliament.

These

‘ and all parliaments hereafter, there should be no more of the said officers of state  
‘ who should sit and have place, and vote in parliament and articles, but only eight set  
‘ down, and their successors in their place; and if at any time hereafter there should  
‘ be any more of the said officers of state nor eight employed in the execution of the  
‘ said offices by deputation, division, or otherwise whatsoever, yet no more should have  
‘ place and vote in this and all parliaments hereafter, but eight allendarly.’

\* 1640, cap. 3.

† 1640, cap. 25.



These beneficial statutes were, however, rescinded after the restoration, when the recent memory of the tyranny of usurpation, and of the distresses the country suffered under the civil war, and by the total subversion of the ancient constitution, produced for a while a kind of adoration of monarchy, and the most implicit submission to royal prerogative. In 1661, twelve out of each estate were put upon the articles; and we find in the records of parliament the following entry of the 8th of May 1662: 'The which day the archbishops of St Andrews and Glasgow, the bishops of Galloway, Dunkeld, Murray, Ross, Brechin, Caithness, and Isles, being brought into the house, took the oath of allegiance and the oath of parliament. The Lord Commissioner adds the nine bishops above named to the Lords of the Articles; and also adds Sir John Urquhart of Cromartie in place of Sir Alexander Gibson of Durie. And it is declared that the nomination and constitution of the articles at this time shall be without prejudice of what course his Majesty shall take hereafter for the constitution of the articles.' This committee was accordingly restored to its full lustre in 1663, by the authority of parliament\*; and the mode of electing its members that had been observed in 1633 was ordered to be followed in time to come.

But this delusion lasted not long. The ardent spirit of civil and religious liberty which brought about the revolution, and dictated to the estates of the kingdom that memorable vote, by which they declared that James VII. had forfeited his right to the crown, could not submit to a grievance of this kind. It was, indeed, the very first of fifteen articles of grievance, contained in the 18th act of the meeting

\* 1663, cap. 1. This act was a most submissive acquiescence in the will of the King, declared by his commissioner in strong terms. A copy of it is in the Appendix, No. 21.



meeting of the estates in 1689, and represented to King William in order to be redressed in parliament. This article was thus expressed: 'The estates of the kingdom of Scotland do represent, that the committee of parliament, called *the Articles*, is a great grievance to the nation, and that there ought to be no committee of parliament, but such as are freely chosen by the estates to prepare motions and overtures that are first made in the house.' It was accordingly enacted, in the second session of parliament held by William and Mary \*, that the committee of articles should be abrogated in all time to come; and that the then, and all subsequent parliaments, should choose and appoint committees of what number they pleased, there being always an equal number of each estate chosen; the noblemen by the estate of noblemen, the barons by the estate of barons, and the burgeses by the estate of burgeses †, for preparing all motions or overtures first made in the house; and might alter and change such committees at pleasure; but with this condition, that, in all committees, some of the officers of state appointed by the King, or his commissioner, might be present, and have power freely to propose and debate, but no power to vote ‡.

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Although

\* 1690, cap. 3.

† It will be remembered, that an end had been put to the spiritual estate by the act 1689, cap. 3.

‡ This was not altogether agreeable to King William, who considered it to be for the interest of the crown to preserve this committee. He was, however, willing to consent to its being regulated, so that the number might be enlarged and changed as often as the parliament should desire it, and that the parliament might bring matters before them though rejected by the Lords of the Articles. This he thought would answer all the just complaints that had been made of that part of the constitution; but it was pretended by the friends of liberty, that, if even the name and shadow of this committee were allowed to remain, the parliament might again, in time, be insensibly brought



Although I have considered the committee of articles as a distinguishing feature in the parliament of Scotland, yet we find something similar to it in the parliament of England in early times. The great barons delighting to reside at their castles in the country, and having little taste for tedious political investigations, the sessions of parliament were, for some time, very short in England as well as in Scotland. In order, therefore, to get the necessary business quickly despatched, the laws which the King wished to be enacted were drawn up by the council, or by the judges, in the form of statutes, and, after being read in parliament, were at once either passed or rejected\*. Certain persons were also appointed by the King some time before the meeting of a parliament, to receive and try such petitions as were to be presented from the several parts of the kingdom. And, on the first day of the parliament, proclamation was made at the door of the house, and at other public places, that all persons who had any petitions to present should give them in to those who had been appointed to receive them†.

Another difference between the parliaments of the two kingdoms, worthy of remark, is, that, in England, the granting general subsidies or aids to the crown, was, at least, for some centuries before the union, in a manner committed solely to the Commons; whereas, in Scotland, all the three estates went hand in hand in that, as well as in other matters.

It

brought under all those restraints that were then to be provided against; and they accordingly carried their point, and got it totally abolished. See *Burnet*, vol. 2. page 25. *Sir John Dalrymple's Memoirs*, part. 2. book. 3. page 78.

\* Hale's Hist. Common Law, cap. 1. pag. 13. 14.

† Ryley placita Parliamentaria, pag. 240.



It is true, that, in England, every money bill required the concurrence of the Lords as well as of the Commons; but no such bill could originate in the house of Lords; and, although they might refuse to concur, they had no power to make any alterations or amendments. It may therefore with propriety be said, that, in England, the Commons had the sole power of imposing taxes. This rule could not well take place in Scotland, where all the estates met in a joint body, and formed only one house of parliament. Nor, indeed, was there the same reason for it. The upper house in England, consisting of spiritual Lords, who owed their benefices and seats in parliament to the King, and of temporal Lords, who were a hereditary and permanent body, nowise dependent on the people, and who, by their rank, were naturally called to many great and lucrative offices, might be supposed more apt to be influenced by the crown than the Commons, who were a temporary elective body, freely named by the people. It might therefore be thought dangerous to intrust the former even with the power of proposing taxes upon the subject; whereas, on the other hand, it was not to be feared that the latter, who were the representatives of the great body of the nation, would be so ready to grant unnecessary supplies, or to lay a greater burden upon the people than the exigencies of the state truly required. It was sufficient that the Lords had a negative to check the Commons, if they should be too lavish or improvident in their grants \*. But in Scotland, where, for a long time, the bulk of the landed property was in the hands of the church and of the nobles, or their vassals and dependents; and, where there was little

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trade

\* See Blackstone, vol. i. page 169. But how well soever this reasoning may account for the continuance of the practice of all money bills originating in the House of Commons, the introduction of it may be ascribed to another cause, viz. that, when burgeses were first sent to parliament, they had no power to offer any higher supply than they were authorised to grant by their constituents. See *Chief Baron Gilbert's Treatise on the Court of Exchequer*, page 37.



trade or commerce to be the foundation of wealth and independence, it was late before the Commons could have much influence in the affairs of government. The spiritual estate and the nobles, possessed of great estates, might safely be trusted with the power not only of proposing, but even of imposing taxes, which were to be most sensibly felt by themselves\*; and it was unnecessary that their authority should be less in matters of that kind than in other affairs that came to be determined in parliament.

In Scotland, representatives went only from the counties and the boroughs; but, in England, the universities likewise sent representatives to parliament. The first instance we discover of this was in the 28th of Edward I. when a parliament being summoned to consider of that King's right to Scotland, writs were issued for that purpose, requiring the university of Oxford to send four or five, and that of Cambridge to send two or three of their most discreet and learned lawyers †. It was not, however, till the reign of James I. of England, and VI. of Scotland, who plumed himself much upon his scholar-craft, that each of the two universities were indulged with the privilege of constantly sending two out of their bodies to parliament ‡.

It is likewise to be observed, that, besides regular parliaments, the Kings of Scotland were wont, upon particular emergencies, which required

\* While Scotland remained a separate kingdom, few taxes were known but the land tax, which was in general levied in the following proportion: The church lands paid one half; the temporal lands one third; and the boroughs one sixth. See *act* 1597, *cap.* 281. The boroughs pay the same proportion of the land tax at this day.

† Prynne, *Parl. writs* 1. page 345.

‡ Blackstone, vol. 1. page 168.



quired immediate deliberation and execution, such as a sudden invasion, or the necessity of raising a sum of money to answer a sudden exigency, to call what were termed *conventions of the estates*. On such occasions there was no necessity for any formal citation of all those who had a right to sit in parliament: The King called any number that could be speedily drawn together, and their powers were limited to that particular business for which they were called. It should appear, that, on some occasions, it had been neglected to call any of the estate of boroughs to these conventions, and that complaints had been made on that score; for, by a statute of James IV. \*, it was ordained, ‘that the commissaries and headsmen of boroughs be warned, quhen taxes or contributionis are given, to have their advise thereintill, as ane of the three estates of the realme †.’ And  
by

\* 1503, cap. 85.

† Sir George M’Kenzie, in his Observations upon this statute, page 116. says, that ‘it shews, that, of old, taxations were laid on in conventions, which consisted of any the King called *summarly off the street*; nor were the boroughs oft times called.’ It is no doubt true, that, on particular occasions, money was voted in conventions, consisting of a small number of the estates. A remarkable instance is to be found in the privy council records, 6th October 1556: ‘Sederunt Georgius comes de Huntlie, Archibaldus Ergadiae comes, Jacobus Moraviae comes, Jacobus comes de Bothwill, Joannes comes de Athol, Georgius comes de Caithnes, Andreas comes de Rothies, Joannes archiepiscopus Sti Andreae, Alexander episcopus Candidae Casae, Joannes episcopus Rossien. Adam episcopus Orchaden. Robertus episcopus Dunkelden. commissarii burgorum Edinburgh, Dundie, Aberdein, Striveling, Perth, St Androis, Lithgow, Haddington, thesaurarius, computorum rotulator, clericus registri, clericus justiciarum, advocatus. Taxation granted of twelve thousand pounds. For as meikle as sum of the greatest Princes in Christendom hes earnestlie requirit of our Soverans, that be thair ambassadouris thai may be witnesses and gossips at the baptisme of thair Majesties deirest son the native Prince of this realme, quhais requisition being baith reasonabill and honourabill, thair Majesties hes gladlie condescendit thairunto, and daylie lukis for the arriving of the saids ambassadouris; for the quhilk purpos honou-  
rabill expences will be requisite, quhilk movit thair Majesties to expone the matter to a  
guide



by another statute of Queen Mary \*, setting forth, that the Queen intended rather to augment than to diminish the privileges of the inhabitants of boroughs, it was enacted, ' That five or sex of the  
' principalles provestes aldermen and baillies of this realme, fall in all  
' times to cum, be warned to all conventiones that fall happen the  
' Queenis grace and her successeures, to conclude upon peace or  
' weir with quhatsumever her Hienes confederates or enemies, or  
' making or granting of general taxationes of this realme; and that  
' her Hienes or councel fall not conclude nor decerne upon peace,  
' weir, nor taxationes foresaidis without five or sex of the saidis  
' principalles provestes aldermen and baillies of burrowis be warned  
' thairto lauchfullie as effeiris †.'

The

' gude number of the prelatis, nobilitie, and commissiounaris of burrowis conveint  
' this day to that effect; and thai understanding the occasion to be sa necessarie, tend-  
' ing to the honour and estimatioun of our Soverans thair realme, and common weill  
' thairof, hes all with ane consent and avyse, liberallie and voluntarie grantit to thair  
' Majesties for supplying and relief of the saids expenses, ane taxatioun of twelve thou-  
' sand pounds, to be payit be the saids estaitis at the last day of November nixt to cume  
' in manner following; that is to say, six thousand pounds be the spiritual estait, four  
' thousand pounds be the baronis and freehaldaris, and twa thousand pounds be the  
' burrowis,' &c.

\* 1563, cap. 82.

† Keith, in his history, page 151. has given us an account of several acts of the parliament held in 1560, which are not on record, or mentioned by other historians. They were communicated to him from the repository of the Scottish College at Paris, under the following title: ' Heads of acts made in the pretended parliament in August 1560.' One of them stands thus: ' It is statut and ordainit, thair fall be certain commissiounaris  
' of burrowis for the marchandis estate at every convention, at leist 6 or 8 of them to  
' gif thair consent and writ to any taxation (that) beis raisit, or weir or peace tain in  
' hand.'



The famous assembly which, in 1689, declared that James VII. of Scotland had forfeited his right to the crown, and settled it upon William and Mary, was denominated a meeting of the estates. It consisted of the last parliament of James, and was called by circular letters from the Prince of Orange, under his hand and seal. The Duke of Hamilton was chosen president; and a letter having been presented to them from King James, they, before opening it, declared and enacted, 'that, notwithstanding of any thing that may be contained ' in that letter for dissolving them, or impeding their procedure, ' yet that they are a free and lawful meeting of the estates, and ' will continue undissolved, until they settle and secure the Protestant religion, the government, laws, and liberties, of the kingdom.' This declaration was subscribed by seven bishops, forty-two peers, fifty barons, and the like number of burgessees.

Although the constitution, and not the powers, of the Scottish parliament, is the object of our present consideration, it will not be improper to add that it was wont to act not only in a legislative, but also in a judicative capacity. In examining the records of parliament, particularly in the time of James III. we find, besides the committee of articles, two other committees, one for appeals from the sentences of inferior judges, and another for causes, which, even of the most trifling nature, were brought directly before the parliament. The court of session, which was established by James V. did indeed, in the last century, dispute the power of appealing from their decrees to the parliament. An appeal having been offered in 1674, the judges ordered the appellant's counsel to say whether or no they had advised that measure? and, upon their refusing to answer, debarred them from the exercise of their profession. They likewise complained to the privy council, who banished not only the appellant's counsel, but all the other advocates who refused to declare their abhorrence of such appeals, twelve miles from Edinburgh. Under this sentence  
many



many of the most eminent advocates remained for several months, till, at the King's desire, they were restored to their privileges, upon disclaiming the right of parties to appeal. But the convention of estates, in 1689, declared the banishment of these advocates without a trial to be a grievance; and, in the claim of right, asserted it to be the privilege of the subjects to appeal to parliament from the decrees of the court of session.

## C H A P.



## CHAPTER III.

*Of the Establishment of the Parliament of Great Britain by the Treaty of Union; and of the Representation allowed to Scotland.*

A N Union of the two kingdoms was early thought of, but did not take place till the reign of Queen Anne. In the time of James VI. of Scotland, and I. of England, the judges of England gave their opinion, that there could be no incorporating union without an entire conformity between the laws of both kingdoms \*. Sir Francis Bacon was, however, of a different sentiment †. He maintained, that a general union of laws was unnecessary; and that no more was requisite, than that such laws as immediately concerned the good of the state should be the same in both parts of the united kingdom. Experience has now happily confirmed the justness of his sentiments; and both nations have reason to rejoice, that the subtle reasoning of the judges in the reign of James met not with the same regard in the reign of his great-grandaughter. It was, however, the subject of much debate in the parliament of Scotland. Those who adhered warmly to the Jacobite interest opposed it with vehemence, as they saw it must strike at the root of all their views and schemes for a new revolution. The Presbyterians were also strongly possessed with a jealousy, that one consequence of an union would be a change in church government. The representatives of the shires and boroughs were accordingly almost equally divided;  
O and

\* Coke, Inst. 4. cap. 75. pag. 347.

† See his works, vol. 4. page 84. 185. 210. 217.



and the peers, whose lustre at least was to suffer by it a considerable diminution, turned the scale for the union in every vote \*.

By this memorable treaty it was agreed, that, upon the 1st of May 1707, and for ever after, the two kingdoms of England and Scotland should be united into one kingdom, by the name of *Great Britain*, and be represented by one and the same parliament, to be stiled *the Parliament of Great Britain*. All the English Lords, both spiritual and temporal, were allowed to retain their privilege of sitting in the House of Peers; and the counties, universities, cities, boroughs, and cinque ports of England, were to send the same number of representatives to the British that they formerly sent to the English House of Commons, amounting the whole to 513 †. But the representation given to Scotland was much limited. By the twenty-second article of the treaty it was agreed, that the representatives for that part of the united kingdom should consist of sixteen peers, to sit and vote in the House of Lords, and forty-five commoners to sit and vote in the House of Commons ‡. By an act passed in the parliament of Scotland ||, confirmed in the parliament of England, and declared by both to be equally valid as if it had been engrossed in the treaty of union, it was enacted, that the sixteen peers should be elected by the peers of Scotland, and their heirs or successors to their dignities and honours, out of their own number, by open election and plurality

\* Burnet's History of his own times, vol. 2. page 459.

† For a more particular account see the Appendix, No. 22.

‡ This was, however, as great a proportion as Scotland was to receive when a part of the commonwealth. By the instrument of government under the protectorate, anno 1654, the members for England and Wales were not to exceed 400, and Scotland and Ireland were each to send 30; *Rapin*, vol. 2. page 593.

|| 1707, cap. 8.



lity of voices \*: That, of the forty-five commoners, thirty should be chosen by the shires or stewartries, and fifteen by the royal boroughs: That, of the commissioners for shires, each shire or stewartry should name one, except the shires of Bute and Caithness, which were to choose by turns, Bute having the first election, the shires of Nairn and Cromarty to choose by turns, Nairn having the first election, and the shires of Clackmannan and Kinross likewise to choose by turns, Clackmannan having the first election: That, of the fifteen burghs, the city of Edinburgh should elect one †, and the other boroughs, which were divided into fourteen several districts ‡, should each of them elect a commissioner, in the same manner they were wont to elect their representatives to the parliament of Scotland: That the commissioners so elected should meet at such times and places, within their respective districts, as her Majesty, her heirs, and successors, should appoint, and elect one representative for each district; and that, in the event of an equality of votes, the president of the meeting should have a casting or decisive vote, the commissioner.

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\* Burnet says, that, in 1712, 'the court proposed, that the peers of Scotland should not sit by election, but by descent, in case the rest of the peers of that nation should consent to it.' This proposal, however, did not take effect. In 1718, or in the beginning of 1719, a scheme was in agitation, that, instead of sixteen elective peers from Scotland, there should be twenty-five hereditary, by adding nine out of the Scottish nobility to the sixteen who then sat; that six should be added to the English peerage; and that, from that time, the peerage should remain fixed. To this scheme the King agreed; but it came to nothing; the bill went off for that session, and was never brought in again. See *Biog. Brit.* vol. 1. page 38. *Blackstone*, vol. 1. page 157.

† Before the union, one of the members for the city of Edinburgh was a merchant, and the other a tradesman: Hence it was contended, that, after the union, when only one member was to be chosen, such member should be alternately a merchant and tradesman: But this was reprobated. See *Douglas's Controverted Elections*, vol. 2. page 210.

‡ The division of the boroughs into the fourteen districts, is to be found in the Appendix, No. 23.



missioner from the eldest borough presiding in the first meeting, and the commissioner from the other boroughs in each district presiding afterwards by turns, according to the order in which they were called in the rolls of the parliament of Scotland \*.

It was farther declared by this statute, that none should be capable to elect, or to be elected, to represent a Scottish shire or borough in the parliament of Great Britain, but such as were formerly capable to elect, or to be elected, commissioners for shires or boroughs to the parliament of Scotland. It likewise contained some other regulations on that head; but, as these will come to be fully considered in the sequel, it is needless to take notice of them at present.

By this act it was also ordered, that, when her Majesty, her heirs, and successors, should declare their pleasure for holding the first, or any subsequent parliament of Great Britain, and until farther provision should be made by parliament in that respect, a writ should pass under the great seal of the united kingdom, directed to the privy council of Scotland, and containing a warrant and command to them to issue a proclamation, requiring the peers to meet at such time and place within Scotland as her Majesty, her heirs, and successors, should appoint, for the election of the sixteen peers; and requiring the Lord Clerk Register, or two of the clerks of session, to attend such meetings, and to return the names of the sixteen peers chosen to the clerk of the privy council, by whom they were again to be returned to the court from which the writ issued.

Similar orders were given with regard to the election of commissioners for shires and boroughs. The proclamation by the privy council was to require the freeholders to meet at the head boroughs of

\* That order is observed in No. 23. of the Appendix.



of their respective counties to elect their commissioners, and the city of Edinburgh to elect their commissioner, and the other boroughs to send each their commissioner to such places as should be thereby appointed for the election of their representatives; and the names of the representatives so elected for the shires and boroughs being transmitted to the clerk of the privy council, were likewise to be returned by him to the court from which the writ issued.

The same statute farther provided, that, in the event of her Majesty's declaring, on or before the 1st day of May then next, 1707, that it was expedient that the Lords and Commons of the then parliament of England should be the members of these respective houses of the first parliament of Great Britain, for and on the part of England; the sixteen peers and forty-five commoners who should be chosen by the peers, barons, and burgesses, respectively, in the then parliament of Scotland, and out of the members thereof, should be the members of the respective houses of the first parliament of Great Britain, for and on the part of Scotland. This declaration having accordingly taken place, the first parliament of Great Britain met at Westminster upon the 23d of October 1707, and was composed as follows: The house of Lords, of the whole body of the Lords spiritual and temporal of England, and of sixteen peers of Scotland; and the house of Commons of the 513 representatives sent to the last parliament of England by the shires, universities, cities, cinque ports, and boroughs, and of 45 representatives of the shires and boroughs of Scotland, chosen from the commissioners for shires and boroughs in the last Scottish parliament \*.

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\* It seems to be an agreed point, that, since the union, the King had it not in his power to bestow a new right to any counties or boroughs, either in England or Scotland, of sending members to parliament. See *Douglas*, vol. 1. page 70.



By an act passed in the first session of the first British parliament \*, intituled, 'An act for rendering the union of the two kingdoms more intire and compleat,' it was declared, that, from and after the 1st of May 1708, there should be but one privy council for the kingdom of Great Britain. It therefore became necessary to make some new regulations with regard to the election of the representatives of Scotland. It was accordingly ordered by the same act, that, when a parliament was to be summoned, writs under the great seal of Great Britain should be directed to the several sheriffs and stewarts, who, upon receipt thereof, were forthwith to give notice of the time for election of the knights or commissioners of their respective shires or stewartries, and to direct their precepts to the Lord Provost of the city of Edinburgh to cause a burges to be elected from that city, and to the other royal boroughs within their several jurisdictions, reciting the contents and date of the writs, and commanding each of them to elect a commissioner, and to order such commissioner to meet at the presiding borough of the district, upon the thirtieth day after the *teste* of the writ, (or the day after, if it should fall upon a Sunday), for the purpose of choosing their burges to serve in parliament. This act likewise directed the clerks to the meetings of the freeholders, and the common clerks of the presiding boroughs, to return the names of the persons severally elected for the shires and districts to the sheriffs or stewarts; and appointed them to annex the same to the writs, and to return the whole to the court from which the writs issued.

This statute made no provision for the election of the peers. But, by another act of the same session †, it was ordered, that, when her Majesty, her heirs, or successors, should declare their pleasure for holding

\* 6to Annae, cap. 6.

† 6to Annae, cap. 23.



holding a parliament, a proclamation should issue under the great seal, commanding all the peers of Scotland to meet at Edinburgh, or in such other place, and at such time, as should be thereby appointed, in order to elect the sixteen peers; and that such proclamation should be duly published at the market cross of Edinburgh, and in all the county towns of Scotland, twenty-five days at least before the day of election.

This is the latest statute of any consequence relative to the election of the sixteen peers of Scotland. Several very material acts have however passed since that time with regard to the election of commissioners for shires and boroughs; and many questions have arisen in the courts of law upon the construction of these acts. Alterations have been made with respect to the qualifications of voters; oaths have been introduced to prevent bribery, and the rearing up of nominal and fictitious votes; and remedies have been applied to abuses on the part of the electors, and of the ministerial officers employed in matters of election. To go through these several acts of the legislature according to their dates, or to state the decisions of the courts of law in the order they were pronounced, would not be the most proper way to give a distinct notion of the present state of the law of elections. I shall therefore follow a different method, by exhausting what I have to observe upon one subject before I proceed to another; and I flatter myself that I shall thereby be able to obtain, at least in some degree, the end I have in view.







## B O O K II.

### Of the Election of the Sixteen Peers of Scotland.

**I**N this book I propose, *first*, to consider what the law requires to enable one to vote in the election of the sixteen peers; and, *next*, to state the mode of procedure observed in such elections.

## C H A P T E R I.

### *Of the Qualifications necessary to entitle a Person to Vote in the Election of the Sixteen Peers of Scotland.*

IT has been already mentioned, that the sixteen peers by whom the Scottish peerage was to be represented in the parliament of Great Britain were to be elected by the Peers of Scotland \*, and the heirs or successors to their dignities and honours. This includes all English peers who were likewise peers of Scotland before the union, or have since succeeded to a Scottish peerage. No British peer is, however, entitled to vote. In the election which took place upon the 17th of June 1708, the Duke of Queensberry, who, after the union, had obtained a patent creating him Duke of Dover, claimed a vote:

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\* By the act of the parliament of Scotland 1640, cap. 20. no stranger created a peer was to be admitted to parliament, unless he had at least 10,000 merks Scots, *i. e.* L. 555 : 11 : 1 $\frac{1}{3}$  Sterling yearly of land rent. But this act was, with many others, rescinded by the lump at the restoration.



A protestation was, however, entered against his right, in respect of his being a British peer. And it was accordingly resolved by the House of Lords, January 21. 1708-9, 'That a peer of Scotland claiming to sit in the House of Peers by virtue of a patent passed under the great seal of Great Britain after the union, and who now sits in the parliament of Great Britain, had no right to vote in the election of the sixteen peers who are to represent the peers of Scotland in parliament.' The house had divided upon this question. It was maintained on the one hand, that, as those peers of England who were likewise peers of Scotland, had the right of voting in the election reserved to them, notwithstanding their having a seat in the House of Lords, there seemed to be equal reason for allowing that privilege to such of the peers of Scotland as had been created British peers. But to this it was answered, that a peer of England and a peer of Scotland held their dignity under two different crowns, and by two different great seals; but that, Great Britain including Scotland as well as England, the Scottish peerage sunk in that of Great Britain \*.

Upon the 20th of December 1711, a point occurred of a more interesting nature. The Duke of Hamilton had been created Duke of Brandon after the union; and a debate having arisen with respect to his right to sit in the House of Lords in virtue of that peerage, and the question being put, 'Whether Scottish peers created peers of Great Britain since the union have a right to sit in that house?' it carried in the negative by a majority of five votes, 57 to 52 †. This was

\* See Burnet's history of his own times, vol. 2. page 518. This resolution was made in a controverted election between the Marquis of Annandale and the Marquis of Lothian.

† See Burnet, vol. 2. page 586. 587. 591. 593. Peere Williams, vol. 1. page 582. reports



was reckoned a hard decision even at the time. The Queen (who heard the debate) and her ministers, seemed to be much concerned at the issue, and the Scots were enraged. They met together, and signed a representation to the Queen, complaining of it as a breach of the union, and a mark of disgrace put upon the whole peerage of Scotland, adding solemn promises of maintaining her prerogative either in an united or in a separated state. It was part of a message sent by the Queen to the House of Lords on the 14th of January 1711-12, that she desired their advice and assistance to quiet the uneasiness that the peers of Scotland were under by the late judgment. That business occupied the house several days. It was then the court proposed as an expedient, that the sixteen peers of Scotland should not sit by election, but by descent, in case the rest would consent. That proposal occasioned much debate. In

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reports the question thus: 'That no patent of honour granted to any peer of Great Britain, who was a peer of Scotland at the time of the union, can entitle such peer to sit and vote in parliament, or to sit on the trial of peers. Contents 57, non-contents 52.'

While this resolution remained in force, there was no room for a renewal of the question that was decided in 1708-9 with respect to the Duke of Queensberry. It would have been inconsistent that those who could no longer claim an inelective seat should be deprived of their votes in the election of the sixteen representatives of the Scottish peerage; and the Dukes of Hamilton and Queensberry both voted at the election in the year 1733, though under a declaration that they did not thereby mean to pass from their claim to the full privileges of British peers. The resolution remained, however, still applicable to all those who, having been created British peers since the union, had already succeeded, or might succeed, to Scottish peerages. Such is the case of the present Duke of Argyle; and such will be the case of the present Lord Cardiff, who, upon the death of his father, will succeed to the Scottish peerage of Bute. A late decision of the House of Lords, in the case of the Duke of Hamilton, to be immediately mentioned in the text, did indeed restore the resolution now in question to its original extent.



the mean time, the Scottish peers resolved to sit no longer in the house; but, after a few days absence, they were induced by secret forcible arguments (as Bishop Burnet expresses it) to return; and there the matter rested till the year 1720, when a similar decision was given in the case of the late Duke of Queensberry. At last, however, in 1782, justice was done to the Scottish peerage. The present Duke of Hamilton claimed his right to be called to the House of Lords as Duke of Brandon; and, after hearing counsel, the following question was put by the house to the judges: 'Whether, by  
' the twenty-third article of the act of union, which declares all peers  
' of Scotland to be peers of Great Britain, with all the privileges enjoyed by the peers of England, except the right and privilege of  
' sitting in the House of Lords, and the privileges depending thereon, the peers of Scotland be disabled from receiving, subsequently  
' to the union, a patent of peerage of Great Britain, with all the  
' privileges usually incident thereto?' In answer to this question, the Lord Chief Baron delivered the unanimous opinion of the judges present, 'That the peers of Scotland are not disabled from receiving,  
' subsequently to the union, a patent of peerage of Great Britain,  
' with all the privileges usually incident thereto.' Upon which the following report was ordered to be presented to his Majesty: 'May  
' it please your Majesty—We the Lords Spiritual and Temporal, in  
' parliament assembled, having heard counsel upon the petition referred to us by your Majesty from the most noble Douglas Duke  
' of Hamilton and Brandon to your Majesty, praying your Majesty  
' would be graciously pleased to give directions that a writ be issued  
' to summon the petitioner to parliament by the title of Duke of  
' Brandon, and having consulted the learned judges, and considered  
' their answer, which was unanimous, to a question of law which  
' arose in the course of our examination, we beg leave to certify to  
' your Majesty our humble opinion and advice, that the said Duke  
' of



‘ of Brandon is entitled to his writ of summons. All which is humbly submitted to your Majesty’s wisdom and justice \*.’

It may be asked, Whether a peeress of Scotland, in her own right, the present Countess of Sutherland for example, can appear at an election personally, or by proxy, and claim a vote. No instance has hitherto occurred; and, although Ladies were summoned to parliament by Edward I. yet, since his reign, the example has not been followed. No woman votes in the election of a commoner, but her husband, if she be married, votes in right of her freehold; and we may reasonably conclude, that a peeress can as little put in a claim to a vote in the election of the peers of Scotland. Though not excluded by positive statute, a custom wisely adapted to the delicacy of the sex must be sufficient to prevent her.

No peer can either vote or be elected until he be twenty-one years of age. It were indeed absurd to allow those whom the law, on account of their nonage, presumes to stand in need of the assistance of others in the management of their own affairs, to have a voice in matters of state. No English or British peer can be called up to the House of Lords until he be of age.

The Scottish statute 1707, cap. 8. likewise excludes Papists, and all those who, being suspected of Popery, refuse to swear and subscribe the formula contained in the act 1700, cap. 3. entitled, ‘ an act for preventing the growth of Popery †.’

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\* Before this decision, the hardship of the former judgments had, in some degree, been mitigated, by introducing a new practice, of creating the eldest sons of Scottish peers British peers during their fathers lives; such creations not being liable to be vitiated by their subsequent succession to the Scottish peerage.

† The formula is of the following tenor: ‘ I do sincerely, from my heart, profess and declare,



The British act, 6to Annae, cap. 23. requires that the peers, before proceeding to election, shall take and subscribe the oaths of allegiance and abjuration; but, as these are so generally known, it is needless to insert them. I shall only observe, that, upon the death of the late Pretender, some small alterations were made upon the oath of abjuration by the act 6to Georgii III. cap. 53.

The same statute likewise requires their taking the oath, and also the declaration inserted in the note below \*.

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‘ declare, before God, who searcheth the heart, that I do deny, disown, and abhor, these  
 ‘ tenets and doctrines of the Papal Romish Church, viz. the supremacy of the Pope and  
 ‘ Bishop of Rome over all pastors of the Catholic Church; his power and authority  
 ‘ over Kings, Princes, and states, and the infallibility that he pretends to, either without  
 ‘ or with a general council; his power of dispensing and pardoning; the doctrine of  
 ‘ transubstantiation, and the corporal presence, with the communion without the cup  
 ‘ in the sacrament of the Lord’s Supper; the adoration and sacrifice professed and prac-  
 ‘ tised by the Popish Church in the mass; the invocation of angels and saints; the  
 ‘ worshipping of images, crosses, and relicks; the doctrine of supererogation, indulgen-  
 ‘ cies, and purgatory; and the service and worship in an unknown tongue: All which  
 ‘ tenets and doctrines of the said church I believe to be contrary to, and inconsistent  
 ‘ with, the written word of God. And I do from my heart deny, disown, and disclaim,  
 ‘ the said doctrines and tenets of the Church of Rome, as in the presence of God,  
 ‘ without any equivocation or mental reservation, but according to the known and  
 ‘ plain meaning of the words, as to me offered and proposed. So help me God.’

\* The oath which is commonly called the oath of Supremacy is as follows: ‘ I A B  
 ‘ do swear, that I do from my heart abhor, detest, and abjure, as impious and hereti-  
 ‘ cal, that damnable doctrine and position, that Princes excommunicated or deprived  
 ‘ by the Pope, or any authority of the See of Rome, may be deposed or murdered by  
 ‘ their subjects, or any other whatsoever. And I do declare that no foreign Prince,  
 ‘ prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiori-  
 ‘ ty, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. So help  
 ‘ me God.’

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By the act of the 19th of George II. cap. 38. § 26. it is declared, that no peer shall be capable to elect or to be elected, who, within a year preceding the election, has been twice present at divine service in any Episcopal meeting, the pastor whereof has not taken the oaths to government, and does not pray for the King by name, and for all the royal family, in the same form as in the liturgy of the Church of England. It is competent to any peer present at the election to make this objection, and to prove it either by one witness, or by the oath of the peer objected to, which the clerk Register, or either of the clerks of session officiating at the election, is impowered to administer; and in case the fact be proved or admitted,

The declaration, which is commonly called the Test, runs thus: 'I *A. B.* do solemnly and sincerely, in the presence of God, profess, testify, and declare, that I do believe, that in the sacrament of the Lord's Supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the Church of Rome, are superstitious and idolatrous. And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English Protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the Pope, or any other authority or person, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am, or can be, acquitted before God or man, or absolved of this declaration, or any part thereof, although the Pope, or any other person or persons, or power whatsoever, should dispense with, or annul the same, or declare that it was null and void from the beginning.'

This declaration, which the peers are necessarily obliged to make before they give their votes, approaches so nearly to the formula as to make one think that the latter might be dispensed with; but, as the Scottish act 1707, cap. 8. stands unrepealed, the formula may no doubt still be put, and any peer who shall refuse to swear and subscribe it, will effectually disqualify himself from voting at that election.



ted, or the peer objected to refuse to depose, he is thereby disqualified from voting at that election.

The peers have a privilege, in matters of election, beyond commoners. They are not only entitled to vote when present, but may, even when absent, either appoint a proxy to vote for them, or send a signed list to the meeting. This privilege is, however, laid under certain regulations.

In the *first* place, the person appointed proxy must be a peer, qualified according to law, and having a right himself to vote at the election; and the mandate by which he is named must be duly signed before witnesses. Such are the words of the Scottish act 1707, cap. 8.; and, on the 26th of January 1708-9, the House of Lords resolved, that such mandates were not valid without the subscription of the witnesses. It was, however, found, upon the 29th of the same month, that there was no necessity for their mentioning the names of the witnesses, or of the person by whom they were written, nor for their being sealed, or written upon stamped parchment. With regard to the lists which absent peers are allowed to send to the meeting, the statute requires only that they be signed; but the House of Lords likewise resolved, upon the same 29th of January 1708-9, that such lists were not valid without subscribing witnesses, but were good although they neither mentioned the name of the writer, nor the designations (additions) of the witnesses.

In the *next* place, such as are peers both of England and of Scotland must sign their proxies, or lists, by the title of their Scottish peerage; and no peer can act as proxy for more than two peers at one time \*.

*Lastly,*

\* 6to Annae, cap. 23. § 5. 6.



*Lastly*, The absent peers who appoint proxies, or send signed lists to the meeting, must take and subscribe the oaths and declaration ordered to be taken by those who are present at the election. Those who live in Scotland may do so in any sheriff-court \*; and the sheriff-depute, or his substitute, before whom they are taken, must return the original subscription of such oaths and declaration to the meeting, together with a certificate under his own hand and seal, that they were taken and subscribed in his presence †. Those, again, who, at the time of issuing the proclamation for the election, reside in England, are allowed to take and subscribe them in the high court of chancery, court of King's bench, court of common pleas, or court of exchequer, to be certified by writ under the seals of such courts ‡: And, as some peers who had formerly qualified themselves might be absent from the kingdom, in the service of the crown, at the time of issuing a proclamation for election, and it was thought hard to deprive them of their votes merely because they had it not in their power to qualify anew, the statute allowed them to appoint proxies, or to send signed lists, upon its being certified, in the manner above mentioned, that they had formerly taken the oaths and declaration,

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or

\* By the act of the 20th of George II. cap. 43. § 29. sheriffs depute are authorised to hold courts not only at the head borough of the shire, but at other places, upon giving the intimation prescribed by that statute. In practice, they hold courts for the purpose of administering the oath to peers without any intimation. As the high sheriff, or sheriff principal, cannot now hold any court, so neither can he administer these oaths.

† It was accordingly declared by the House of Lords, January 26th 1708-9, that the sheriff's certificate must be sealed as well as signed. The words of the statute are indeed express; and the doubt could only arise from its not being customary to adhibit seals to writings in Scotland.

‡ The court of chancery is open all the year, so the peers can never be at a loss..



or upon its being certified under the great seal, in the event of their having taken them in parliament \*.

The act of the 19th of George II. contains no provision for rejecting the proxies or signed lists of absent peers who may have been twice at a non-jurant meeting within a year before the election; but, upon a proof of the fact, their proxies, or signed lists, must be refused, as, otherwise, the object of the law might be altogether defeated. The statute does indeed, in general, disqualify them from voting, and their sending proxies, or signed lists, is voting, in the proper sense of the word, as much as if they were present at the election.

It may be asked, Whether a peer who has the misfortune to become fatuous can vote in an election? The law has said nothing on that head. I incline to think, that, if he is declared to be in that unhappy state by an act of the law, and put under the power of a guardian or tutor, his vote cannot be received by the returning officers; but that, until that be done, they are not at liberty to reject it, although such votes, if questioned in the House of Lords, ought undoubtedly to be set aside. If, indeed, a vote were to be claimed by a peer who was manifestly *non compos*, I think the returning officer should be justified in rejecting it.

## CHAPTER

\* 6to Annae, cap. 23. § 4.

Forms of a proclamation for an election of peers, and of a proxy, a signed list, and a sheriff's certificate, are inserted in the Appendix, No. 24. 25. 26. and 27.



## CHAPTER II.

*Of the Manner of Electing the Sixteen Peers of Scotland.*

**W**E have already seen, that, when a parliament is to be held, the peers of Scotland are called, by proclamation, to meet for the purpose of electing their representatives; and that such proclamation must be published at Edinburgh, and the other county towns of Scotland, at least twenty-five days before the time appointed for the election.

The same statute \* orders the peers to come to such meetings with their ordinary attendants only, under the several penalties inflicted by the laws and statutes of Scotland, prescribing and directing with what numbers and attendants the subjects of that part of the kingdom might repair to the public courts of justice †.

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\* 6to Annae, cap. 23. § 8.

† By the act 1457, cap. 82. confirmed by 1487, cap. 104. it was ordained, that all the lieges should come to the King's courts, spiritual or temporal, in a sober and quiet manner, and bring with them no more persons than are in their daily household and family. By the act 1555, cap. 41. persons called before a criminal court were only allowed to have six of their friends with them at the bar, besides their advocates, to defend them; the prosecutors were allowed to bring no more than four; and the judges were ordered to charge the breakers of that act to enter their persons in ward, to remain there during the Queen's pleasure, under the pain of rebellion, and in case of their refusal to put them to the horn, *i.e.* outlaw them. These acts were ratified by 1584, cap. 140. with this addition, that those who repaired to the criminal courts otherwise than they were allowed.



It likewise declares, that it shall not be lawful for the peers to meet together to act, propose, debate, or treat, of any matter or thing whatsoever, except the election of their representatives; and that any person who shall at such meeting presume to act, propose, debate, or treat, of any other matter, shall incur the penalty of *premunire*, as expressed in the statute of the 16th of King Richard II \*.

The day named for the election being come, the peers assemble at the place fixed by the proclamation †, and are attended by the Lord Clerk

lowed by such acts, should incur the crime of convocation of the King's lieges. An unlawful convocation is a commotion of the people raised without legal authority. The convoking the lieges in bands of men of war for daily or monthly wages, without special license, was made capital by the acts 1563, cap. 75. and 1585, cap. 12. But Sir George M'Kenzie informs us, that the crime of simple convocation, without bands or leagues, was commonly prosecuted before the privy council, and was seldom punished, *tanquam crimen per se*, but only as an aggravation of a riot, or other crime.

\* The statute here referred to was designed to prevent the purchasing of bulls from Rome, and to declare the independency of the crown of England; and it particularly enacted, 'that if any purchase or pursue, or cause to be purchased or pursued, in the court of Rome, or elsewhere, by any such translations, processes, and sentences of excommunication, bulls, instruments, or any other things whatsoever which touch the King, against him, his crown, and his regality, or his realm, as is aforesaid; and they which bring within the realm, or them receive, or make thereof notification, or any other execution whatsoever, within the same realm, or without, that they, their notaries, procurators, maintainers, abettors, fautors, and counsellors, shall be put out of the King's protection, and their lands and tenements, goods and chattels, forfeit to our Lord the King; and that they be attached by their bodies, if they may be found, and brought before the King and his council, there to answer to the cases aforesaid; or that process be made against them by *premunire facias*, in manner as it is ordained in other statutes of provisors, and other which do sue in any other court, in derogation of the regality of our Lord the King.'

† The place always now appointed is the abbay of Holyroodhouse. The bailie of the



Clerk Register, or two of the principal clerks of session, appointed by him to officiate in his name. After prayers by one of the King's chaplains, two of whom attend for that purpose, the proclamation, and the execution at the market cross of Edinburgh \*, are read; but no evidence of the execution at the other county towns is required or produced. The roll is then called †, and the peers present are marked in the minutes, as are likewise the proxies and signed lists of those who are absent. This being done, the oaths and declaration are administered to the peers who are present, and the oaths taken by those who have sent proxies or lists are examined; after

the abbey picks out from the inhabitants a guard to attend on the occasion, and names officers to command them. The room where the peers meet is prepared for their reception by the keeper of the wardrobe.

\* By an execution, in the language of the law of Scotland, is understood the indorsement of the proper officer, certifying that a proclamation, or other writ, has been duly published or served.

† The roll is the same with that which was called in the last parliament of Scotland, (a copy of which is annexed in the Appendix, No. 28.), with the following alterations. There have been since added the Prince of Wales as Duke of Rothsay, who accordingly voted in 1716 by a signed list; the Earl of Solway, (a title conferred upon the late Duke of Queensberry in 1706, then an infant, and a second son, but now extinct), and the Lords Sommervill, and Colvil of Culrofs, in terms of an order of the House of Lords of the 27th May 1723. The peers who were attainted for their accession to the rebellions 1715, and 1745, are now left out. Some other peerages being supposed extinct, the House of Lords have issued orders prohibiting certain persons from assuming the titles until they establish their right to them; but, as these prohibitions are personal, the titles remain upon the roll, and are called as formerly.

At the election 1768, a list was sent by Walter Lord Aston of Forfar, but no such peerage being upon the roll, the list was not received. Those, however, who can establish their right to a Scottish peerage, although not upon the roll, may vote under protestation; and their votes, if brought to a question in the House of Lords, must in justice be sustained.



After which, the votes are carefully collected, and the lists investigated, and a certificate of the names of the sixteen peers who have the majority of voices in their favour is made out upon parchment, signed and read in presence of the meeting by the Lord Clerk Register, or the clerks of session appointed to officiate for him, and returned to the court of chancery before the time fixed for the meeting of the parliament, in a packet addressed to the clerk of the crown \*.

The peers have no power to decide upon disputed titles at their meetings for election. When, therefore, two appear to claim the same peerage, both must be allowed to vote; but protests may be entered by the other peers against the votes of both or either of them; and, in like manner, they may themselves object to, and protest against, each other's right. No notice is, however, taken in the certificate returned to the crown office of any objections that may have been made in the meeting; but those peers who desire it are entitled to get a copy of such objections, or an extract (exemplification) of the minutes from the returning officer, and may dispute the election of the peer, or peers, objected to, by preferring a petition to the House of Lords complaining of the return. Of this there are two instances, the one in 1708-9, the other in 1734-5. Upon the first of these occasions, the clerks of session who made the return were ordered to carry up the proceedings, and to vindicate their conduct.

The law has established no decisive, or casting vote, in the event of an equality of voices for two or more of the candidates: All, therefore, the returning officers can do, is to certify the fact, leaving it to the House of Lords to act as they shall think fit.

Hitherto

\* A copy of the certificate is to be found in the Appendix, No. 29.



Hitherto I have only spoken of a general election upon the calling of a new parliament. The same rules are, however, observed when a vacancy happens by the death, or legal disability, of any of the sixteen peers during the course of a parliament. A proclamation issues for summoning all the peers to meet and elect a new representative to supply the vacancy; and the same form of procedure takes place at that meeting as at a general election \*.

All elections ought to be free; and to remove even the appearance of restraint, it was ordered by an act of the 8th of George II. cap. 30. that all soldiers who are quartered in any city, borough, town, or place where an election either of peer or commoner is to be made, shall be removed to the distance of two miles, one day at least before the day appointed for the election, and shall not approach nearer till the day after it is ended. Orders to this purpose must be given by the secretary at war, or other person who officiates in his place; and if he neglect to issue such orders, and be convicted thereof within six months, he is to be discharged from his office, and becomes disabled to hold any office or employment in his Majesty's service. This act does not, however, extend to the city of Westminster, or borough of Southwark, in respect to his Majesty's guards; nor to any place where the King or royal family reside at the time, in respect to such troops as attend as guards; nor to any castle or fortified place where a garrison is usually kept, in respect to such garrison. The act likewise declares, that the secretary at war shall not incur the forfeiture on account of his not sending orders for the removal of the troops at an election for filling up a vacancy, unless notice of the new writ be given him by the clerk of the crown, who is ordered to do so with all convenient speed. No writ issues for supplying a vacancy in the  
sixteen

\* 6to Annae, cap. 23. § 11.



sixteen peers. Probably the royal proclamation would be held a sufficient notification to the secretary at war. Indeed, the exception of the statute does not literally apply to that case.

Ever since the union, the ministry has had great influence in the election of the sixteen peers of Scotland; and the court list has almost universally prevailed. For a long time, the matter was managed, with at least an appearance of delicacy, by some of the peers themselves; but, at last, it became usual for the minister to send official circular letters to all the peers. At the general election in 1768, Lord Irvine, though not possessed of an inch of property in Scotland, was elected one of the sixteen peers. And, on the death of the late Duke of Argyle in 1771, the Earl of Dysart, a peer of Scotland, but precisely in the same situation with Lord Irvine, was proposed by a recommendatory letter from Lord North, then at the head of the treasury. This gave offence to many of the peers, who set up the Earl of Breadalbain in opposition; upon which the ministry wisely dropped the Earl of Dysart, and, in his room, declared for the Earl of Stair, who was accordingly elected by a majority of nine votes. At this election the official letters were complained of in severe terms, and several protests were taken against them. The same thing happened at the general election in 1774, when there was a warm contest between the Earl of Cassillis, set up by the court, and the Earl of Eglintoun, started against him by opposition. On that occasion, another official letter was circulated, and the Earl of Cassillis prevailed. This disgraceful practice of sending these letters has, however, ever since been discontinued, and good humour and harmony among the peers have been restored.

In the end of the year 1718, and the beginning of 1719, there was much talk of a peerage bill. The scheme was this: Instead of sixteen elective peers from Scotland, there were to be twenty-five hereditary,



hereditary, by the junction of nine, out of the body of the Scottish nobility, to the sixteen then sitting in the House of Lords. Six were also to be added to the then English peers; and from thence the peerage to be fixed. The King gave his consent to this scheme; but the bill went off for that session, and was no more heard of\*.

In the year 1733, it was moved in the House of Lords that the election of the sixteen peers for Scotland should be by ballot; but the motion was rejected†.

## R

## BOOK

\* Biog. Brit. vol. 1. pag. 38. *voce* Addison.

Blackstone, vol. 1. page 157. mentions, that the bill for limiting the peerage passed the House of Lords, but miscarried in the House of Commons.

† Salmon, vol. 2. page 295.



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\* Hogg, Brit. vol. i. pag. 38. see Addition.  
Hogg, Brit. vol. i. pag. 127. mentions that the bill for limiting the peers; failed the House of Lords, but not in the House of Commons.

† Salmon, vol. ii. page 202.



## B O O K III.

### Of the Election of the Commissioners from the Shires of Scotland.

**I**N this book various subjects will occur. It will therefore be divided into several chapters.

#### C H A P T E R I.

##### *Of the Freeholders Roll.*

IT has been already mentioned, that, by the act of Charles II. 1681, cap. 21. the freeholders of each county were ordered to make up a roll of their number, containing the names of those who had a right to vote, and expressing their respective extents or valuations; and that they were also appointed to meet yearly at the Michaelmas head-court, for the purpose of revising that roll, and making the necessary alterations upon it. From that period no person could legally vote in the election of a commissioner to parliament without being put upon the roll. Before, therefore, proceeding to consider either the qualifications required by the law to entitle one to elect, or to be elected, a commissioner from a shire, or the mode of procedure that is observed in such elections, it will be proper to state



the manner in which that roll is kept, and to mention the rules which the legislature has laid down, in order to guard against the partiality of freeholders in that respect.

The act of the 16th of George II. cap. 11. intituled, 'An act to explain and amend the laws touching the elections of members to serve for the commons in parliament for that part of Great Britain called Scotland, and to restrain the partiality, and regulate the conduct, of returning officers at such elections,' is now the governing law with regard to the manner of keeping the roll, and the form of procedure at the annual Michaelmas head courts.

By this statute it was enacted, that such persons as stood upon the roll last made up by the freeholders, whether at a Michaelmas meeting, or at an election of a member to serve in parliament, should be the original constituent members at the next Michaelmas meeting, or meeting for election; and, as it was supposed that many persons might then stand upon the rolls who had no legal qualification, it was farther provided, that it should be lawful to any freeholder standing upon the roll to object to the title of any other person standing upon it, by applying to the court of session, in the form of a summary complaint, at any time before the first of December 1743; and, upon the presenting of any such complaint, the court of session was directed to grant warrant for summoning the persons complained of to answer upon thirty days notice, and to proceed afterwards to determine the question in a summary way; but it was, at the same time, declared, that, if no complaint should be exhibited within that period, no freeholder standing upon the roll last made up should be struck off, or left out of it, except upon sufficient objections, arising from an alteration of that right or title in respect of which he had been enrolled. Many complaints were accordingly preferred to the court of session within the limited period; and, by  
the



the decisions given in these complaints, the rolls of the freeholders through Scotland came to be better adjusted than they had been formerly\*.

The sheriffs having been irregular as to the time of holding their Michaelmas head courts, it was by this statute directed, that every sheriff should, at least fourteen days before Michaelmas then next, appoint a precise day for holding such court in the year 1743, and cause the same to be intimated at all the parish churches within the shire upon a Sunday, at least eight days preceding; and that the day so to be fixed by the sheriffs should be the anniversary for holding the Michaelmas head courts, in their respective shires, in all time to come.

By this act it was farther made competent to any person who should be refused to be admitted, or who should be struck off the roll by a judgment of the freeholders at any Michaelmas meeting, or meeting for election, to apply within four kalendar months † to the

\* See acts of sederunt, vol. 2. pag: 56. 57. 58. 59.

† A kalendar month is from any day in one month to the same nominal day in the next month. In the case of Carruthers of Denby *contra* Fergusson of Craigdarroch, in 1762, the court of session was of opinion, that a complaint moved by the Lord President on the 6th of February, was within four kalendar months of a meeting of the freeholders held upon the 6th of October preceding. In the case of Gordon *contra* Abernethy, the complaint was moved in court upon Saturday the 23d of January, and was then ordered to be served, but the interlocutor was not written out, nor signed by the Lord President, till Tuesday the 26th. It was objected, that the complaint could not proceed, because Monday the 25th was the last day of the four kalendar months; but this objection was over-ruled, 3d March 1773. The act of parliament only requires the application to be made to the court of session within four months, and it is of no consequence that, through accident, or the hurry of other business, the warrant for summoning the party complained of happens not to be signed till after that period has elapsed.



the court of session, by summary complaint; and that court, after granting warrant for summoning the person on whose objections the complainer was refused to be admitted, or was struck off the roll, to answer upon thirty days notice \*, was directed to proceed and determine upon such complaint in a summary way.

A delay to enroll has been held equivalent to a refusal. At the Michaelmas meeting of the county of Cromarty in October 1765, three claims for enrolment were offered, and upon each of these the freeholders gave the following deliverance: 'The meeting, in respect  
' that a process of reduction is now in dependence at the instance of  
' Sir John Gordon of Invergordon, Baronet, before the court of session, of the decret of division of the commissioners of supply of  
' the shire of Cromarty, dated in May last, whereby alone the valuation of the lands, and others contained in the foresaid claim, is  
' ascertained, do therefore supersede, for the present, coming to any  
' determination upon the validity or invalidity of the claimant's titles  
' to be enrolled, not thinking that matter yet ripe for their judgment, for either sustaining or refusing his enrolment, till after the  
' issue of the said process of reduction; reserving till then to all parties concerned, all objections and answers in relation to the claimants title.' The claimants preferred complaints to the court of session under the authority of the statute, and prayed the court to grant warrant for their being added to the roll. The freeholders objected, that the case did not fall within the words of the statute, in regard that they had not *refused* to enrol, but had only *delayed* to give judgment, until they should have an opportunity of knowing whether or no the claimants were truly possessed of the valuation required by law; and that, at any rate, the court of session, which  
was

\* This notice is now shortened to fifteen days by a later statute of the 14th of Geo. III. cap. 81.



was only a court of review, without any original jurisdiction in matters of that sort, could not order an enrolment *prima instantia*, as prayed for in the complaints, but only direct the freeholders to proceed to judge of the merits of the claims at their next annual meeting. The court repelled these objections, and ordered the claimants to be added to the roll; and afterwards refused a petition from the freeholders, offering to go into the merits of their objections to the claimants titles \*.

A case somewhat similar occurred some years after. Colonel Campbell of Barbreck lodged a claim for being enrolled a freeholder of the county of Bute at Michaelmas 1772. At that meeting only two freeholders attended; and, although they knew that his claim was lodged, and in the hands of the sheriff-clerk, they took no notice of it, because no person appeared in the behalf of the claimant. They accordingly proceeded to make up their minutes as if no such claim had existed; but, while the preses was signing these minutes, the claimant's brother-in-law, who was himself a freeholder, came to the meeting, and insisted that they should take the claim under their consideration. This they refused, upon the pretence that the business was over, and the meeting dissolved. Colonel Campbell preferred a complaint, and the court pronounced the ordinary interlocutor, finding that the freeholders did wrong in refusing to enrol him, and ordering him to be added to the roll. To show their disapprobation of the conduct of the freeholders, the court likewise condemned them in costs of suit †.

This

\* January 1766, Rose of Aitnoch and others *contra* Sir John Gordon and Leonard Urquhart. The House of Lords affirmed both judgments, March 1766.

† June 24. 1773, Colonel Campbell of Barbreck *contra* M'Niel of Kilmory and M'Conochy of Ambirbeg. The propriety of the interlocutors in the Cromarty cases, refusing



This statute farther provides, that any freeholder standing upon the roll, who apprehends that another has been wrongfully enrolled, may, in like manner, complain to the court of session within four kalendar months after such enrolment, whether he was present at the meeting where the enrolment was made or not; but, if no complaint be preferred within that period, the person so enrolled must continue upon the roll until an alteration of his circumstances shall happen, which the freeholders, at a subsequent Michaelmas meeting, or meeting for election, shall allow to be a sufficient cause for striking him off.

If, in any of these cases, the court of session reverse the determination of the freeholders, by ordering a person to be added to, or struck off the roll, the sheriff, or steward-clerk, upon production of an extract of the judgment, must forthwith make the alteration thereby directed, under the penalty of L. 100 Sterling, to be recovered by the person in whose favour such judgment is given, or his executors, by a summary complaint before the court of session, upon thirty days notice.

This statute, taking it in a strict and literal sense, has provided no remedy in the event of the freeholders unjustly repelling an objection for striking a person off the roll. Hence it has been made a question, Whether a complaint to the court of session be competent in a case of

refusing to allow the freeholders to go into their objections to the claimants titles has been doubted; these claimants being thereby put upon the roll without any cognifance taken of the merits of their qualifications. In the case of Campbell of Barbreck, the court of session seemed inclined to listen to any objections which the freeholders could state, but none were offered by them. It was, however, understood in the Cromarty cases, that, if the decree of division should be afterwards reduced, that would import an alteration of circumstances sufficient to authorise the freeholders to strike these claimants off the roll.



of that kind? Two such complaints came from the county of Kinross in 1766 \*; but, in these, the incompetency was not pleaded. It was, however, afterwards pleaded in the case of Mr Pulteney, whom the freeholders of the county of Cromarty had refused to strike off the roll. There the question was fully considered, and the complaint was found competent, although not falling under any of the three cases to which the words of the statute apply †. Similar judgments were afterwards given in the case of Sir George Suttie in 1768, and in the case of Hope Weir *contra* Bruce, February 14. 1771.

A case somewhat different occurred in 1774. Mr Campbell of Shawfield had been enrolled as apparent heir to his grandfather, a freeholder of the county of Lanark; and, at the Michaelmas meeting in 1773, he, without lodging a new claim, moved, that his title to stand upon the roll should be restricted to certain lands, which, from the proceedings of the commissioners of supply, appeared to be sufficient to constitute a freehold qualification. His request being granted by the freeholders, a complaint was preferred to the court of session against their judgment, but the court found that complaint incompetent. Had he been first struck off the roll upon an alteration of circumstances, and then of new enrolled upon the lands to which he restricted his claim, a complaint would have been clearly competent under the statute.

The words of the statute allow only those to complain of an enrolment who stand themselves upon the roll. Complaints have,  
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however,

\* Ranken of Colden, and General Irvine of Burleigh, *contra* Ramsay of Kinkell, and Colvill of Ochiltree.

† February 11. 1768, Sir John Gordon *contra* William Pulteney.



however, been received by the court of session from persons who did not stand upon it at the time of their being preferred. One instance shall be given. Mr Gordon of Newhall claimed to be enrolled as a freeholder of the county of Cromarty at Michaelmas 1766, and his claim being rejected, he complained to the court of session, Mr William Johnston was enrolled at the same meeting, and Mr Gordon likewise complained of that enrolment. Mr Johnston put in an answer to this last complaint, in which, without going into the merits of his own title, he objected to the competency of the complaint, in regard that Mr Gordon did not then stand upon the roll. The court, before deciding upon that objection, ordered an answer upon the merits to be given in. This being done, they proceeded, first, to determine whether Mr Gordon should have been enrolled, and, having ordered him to be added to the roll, they then gave judgment in Mr Johnston's case in the following words: 'The  
' Lords having advised this petition and complaint, with the answers  
' thereto now and formerly given in for Mr William Johnston, the  
' respondent, they repel the preliminary objection to the complaint,  
' that there is no person upon the roll of freeholders intitled to com-  
' plain, in respect, by interlocutor of this date, the title of William  
' Gordon of Newhall to be upon the roll is sustained \*.'

The statute likewise enacts, that, if the judgment of the freeholders, refusing to admit, or striking off the roll, be affirmed by the court of session, the person who preferred the complaint shall forfeit to the objector L. 30 Sterling, together with full costs of suit. This was intended to prevent groundless complaints, but seems to be rather defective, as it neither imposes any penalty, or costs of suit, on the freeholder, who, without just grounds, complains of an enrolment made by the other freeholders, nor gives such penalty or costs to

\* February 17. 1767, Gordon of Newhall *contra* Johnston.



to those who have been wrongfully refused to be admitted, or have been improperly struck off the roll. The court of session may indeed give costs of suit, if they think proper; but they are not bound to do so; nor can they impose the penalty but in the precise terms of the statute, which, in this respect, falls short of the act 1681. And, although it should be thought rather a severe measure to lay penalties or costs upon the freeholders, when their judgments, refusing to admit, or striking off the roll, are reversed, as, in such cases, it may be supposed, that they have only been guilty of an error; yet, surely, there could be no impropriety in subjecting to such costs and penalty the freeholder who brings a groundless complaint against a judgment of the other freeholders admitting one to the roll, or refusing to strike off one to whom he had made frivolous objections.

Where a complaint brought in the joint names of a liferenter and fiar of the same lands is dismissed, the court imposes only one penalty of L. 30 upon both \*.

It has already been observed, that, by the act 1681, cap. 21. no objections could be moved, in the case of a controverted election, in parliament, but those which had been stated at the meeting of the freeholders. From this statute, and from the court of session being only a court of review, and having no original jurisdiction in matters of enrolment, it was maintained, that, in a complaint preferred under the authority of the act of the 16th of George II. no new objections could be made to a claimant's title, in order to support a judgment of the freeholders refusing to enrol him; but the court over-ruled that plea, and found it competent to the respondent to the complaint to maintain every objection that lay against the claim,

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whether

\* 1768, *Frazer, &c. contra Rofs of Priesthill, and Gordon of Carroll.*



whether mentioned at the meeting of the freeholders or not \*. Objections may escape the freeholders at their meeting, and it were hard to put any restraint upon their justifying their refusal, or to bar them from maintaining an insuperable objection to a complain-er's title, merely because they had not thought of stating that particular objection at the time when the claim was presented. It is just to allow them to bring in every circumstance tending to show that their judgment was agreeable to law; and it were absurd to suppose that a court of review could legally order a person to be added to the roll, when the freeholders, who refused to admit him, were able to shew that he had no manner of title to get upon it.

It is a different question whether new evidence can be received before the court of session, in order to support a claim for enrolment which has been rejected by the freeholders. Those who claim to be enrolled ought to establish their qualification in a proper manner: If they neglect to do so, they have themselves alone to blame; and the court of session, being only a court of review, can have no right to order an enrolment upon titles that were not laid before those who are, by law, intrusted with the power of judging in the first instance. So it has been decided. Sir John Gordon claimed to be enrolled as a freeholder of the county of Cromarty at the Michaelmas meeting 1766, but neglected to produce a retour to shew the old extent of the lands on which he claimed. The freeholders having refused to enrol him, he complained to the court of session, and produced there a retour, showing that his lands were of the full extent required by law; but the court dismissed his complaint because the retour had not been produced to the freeholders †.

Another

\* July 28. 1761, Mr Walter Stewart, and others, *contra* Mr David Dalrymple, affirmed in the House of Lords, April 1. 1762.

† February 17. 1767, Sir John Gordon *contra* Frazer. This decree was affirmed in



Another case occurred soon after. Captain Stewart claimed to be enrolled as a freeholder of the county of Forfar, upon the lands of Nevay, lying within the parish of Nevay, and, in proof of his valuation, produced a certificate under the hands of the collector, and two commissioners of the land tax, bearing, that the lands which belonged to the laird of Nevay, in the parish of Nevay, were stated in the valuation roll of the county at L. 800, and paid cess and public burdens accordingly. To this claim it was objected, that no sufficient evidence had been produced, to show that the lands rated at L. 800 in the valuation roll, as belonging to the laird of Nevay, in the parish of Nevay, were the same with the lands of Nevay belonging to the claimant. The freeholders sustained the objection, and refused to enrol. The claimant complained to the court of session; and, although he produced a complete progress of his lands from 1631, downwards, from which it clearly appeared that they were the very same with those that stood rated in the valuation roll at L. 800, the court dismissed the complaint \*.

A third case came from the county of Dumbarton a few years ago. Sir Archibald Edmonston of Duntreath having obtained a charter of certain lands in that county, he conveyed them, in September 1773, to James Stewart of Fenwick in liferent, and to Archibald Edmonston, his own son, in fee; and, by the conveyance, he assigned

in the House of Lords, May 4. 1767; and in the judgment it was particularly declared, 'that the titles produced by the complainer to the freeholders, upon which he claimed to be enrolled, were essentially defective for want of showing a retour, for which reason the freeholders did right in refusing to enrol him; and that, upon his petition, complaining of such refusal, the court of session was confined to the titles laid before the freeholders, having no jurisdiction, by the statute in that case made and provided, to order a claimant to be enrolled upon any title originally produced to them, and not laid before the freeholders in the first instance.'

\* December 19. 1767.



assigned to them the precept of sasine contained in the charter, which still remained unexecuted. Both the fiar and the liferenter were accordingly infeft; and, at Michaelmas 1774, the latter was enrolled a freeholder. The fiar was not then of age. He, however, claimed to be enrolled at Michaelmas 1779, and produced the charter in favour of his father, Sir Archibald, together with his own instrument of sasine, and a regular certificate that the lands were of the valuation required by law; he neglected, however, to produce the conveyance from his father to Mr Stewart in liferent, and to himself in fee. The want of this disposition was accordingly made the ground of an objection to his being enrolled; but the freeholders over-ruled the objection. Against their judgment a complaint was preferred to the court of session; in answer to which, Mr Edmonston founded upon the minutes of the meeting of freeholders in 1774, from which it appeared, that the conveyance had then been laid before them, though it had afterwards been lost or mislaid; and, in order to supply the defect, he produced a new conveyance from his father; but the court found \* that the freeholders did wrong in enrolling him, and therefore ordered his name to be expunged from the roll.

A still later case occurred from the county of Orkney. Mr Moodie of Melfetter claimed, at the Michaelmas meeting 1780, to be enrolled, as apparent heir to his father, in virtue of lands upon which both his father and grandfather had stood on the roll; but having neglected to bring with him his father's charter, and having only produced the sasine that had followed upon that charter, the freeholders rejected his claim, and the court of session approved of their judgment †.

The

\* February 29. 1780.

† February 1781.



The decisions of the court of session, in the cases of Sir John Gordon, Mr Edmonston, and Mr Moodie, appear to be exceedingly well founded; but the propriety of the judgment that was pronounced in the case of Captain Stewart may perhaps admit of some doubt. It accordingly seems now to be an established point, that, although a claimant who neglects to produce any part of his title to the meeting of the freeholders cannot be allowed to supply that defect under a complaint to the court of session, yet it is competent to bring forward new collateral or explanatory evidence to support a title, and to remove objections that have been made to it in the meeting of freeholders. This was first settled in the case of Mr Gordon of Whiteley. That gentleman claimed to be enrolled as a freeholder of the county of Banff, at Michaelmas 1772, upon certain lands, and, amongst others, the lands of Inveraurie, and the lands of Inverhebit, formerly called Middle, or Little Inverhebit, and now called Bellchorach of Inverhebit. To prove the valued rent of these particular lands, he referred to a valuation roll made up in 1690, which contained the following article: 'Inveraurie and Inverhebit 'L. 250.' To this claim it was objected, that there were three different farms of the name of Inverhebit, to wit, Easter, Wester, and Middle, or Little Inverhebit, and that no evidence was produced to shew that the valuation stated in the roll, 1690, to Inveraurie and Inverhebit, applied only to Little Inverhebit. The freeholders sustained the objection, and refused to enrol. Mr Gordon complained of this judgment, and offered to prove, 'that the lands of Little Inverhebit, now called Bellchorach, were the lands, which, together with Inveraurie, had uniformly paid cess for the article of 'L. 250 in the valuation book.' The respondents to the complaint objected to the competency of this proof: It was, however, allowed: And the fact having been established, the objection was repelled, and Mr Gordon was ordered to be added to the roll \*. In this case, and others

\* July 29. 1773, General Abercrombie, and others, *contra* Gordon of Whiteley.



others of a similar nature, from the counties of Elgin, Renfrew, and Kinross, the court made the following distinction. Every person must produce his charter and sasine, and likewise a retour, when he claims upon the old extent, or a certificate of his valuation, if he claim upon valued rent. These are radical titles, without which he cannot be enrolled; but, if they be produced, and appear, *ex facie*, to be good, objections made to them, upon grounds not foreseen, may be removed by new collateral or explanatory evidence before the court of session\*.

Two cases must, however, be mentioned, the last of which, in particular, may, perhaps, be thought not altogether consistent with the judgments pronounced in the cases of Sir John Gordon and Mr Edmonston, or with the principles upon which these judgments proceeded.

The first stood thus: Reid of Logie claimed to be enrolled a freeholder of the county of Forfar at Michaelmas 1767, and produced as his titles, *1mo*, charter of the lands claimed on in favour of Alexander Stormonth; *2do*, disposition from Thomas Stormonth, the son of Alexander, in favour of the claimant, containing an assignment to the unexecuted precept of the charter; and, *3tio*, his own instrument of sasine in virtue of that precept; but, when the claim was moved, the retour of Thomas Stormonth's general service to his

\* In the above mentioned case of Mr Pulteney, where he objected to the competency of the complaint brought by Sir John Gordon, and others, on account of the freeholders refusal to strike him off the roll, it was likewise pleaded, that it was not competent to the complainers to resort to evidence, in support of their objections, which had not been laid before the freeholders when these objections were under their consideration; but, as the new evidence offered in that case by the complainers was Mr Pulteney's own oath, which could not be got in the meeting, as he was not present at it, the plea was over-ruled.



his father, which was a necessary link to connect Thomas with the precept, and to enable him to convey it, was not to be found. That defect was accordingly objected. The objection was, however, overruled by the freeholders; but the court of session, adhering strictly to the precedent in Sir John Gordon's case, altered the judgment of the freeholders, and ordered the claimant to be struck off the roll. Mr Reid, the claimant, appealed to the House of Lords, and, upon the 23d of February 1768, the following judgment was pronounced: 'It appearing to this house that the retour of the service of Thomas Stormonth to his father, Alexander Stormonth, was in the custody of the sheriff-clerk, and clerk to the meeting of the freeholders, in the morning of the day of the meeting; that it was then casually lost; that an extract could not be got of the retour during the sitting of the meeting; and that an extract of the retour was produced to the court of session, and appeared to be truly recited in the conveyance to the appellant, ordered and adjudged, that the interlocutor complained of be hereby reversed.'

The particular circumstances of this case were exceedingly favourable to the claimant, and must sufficiently distinguish it from that of Sir John Gordon; but the other case, now to be mentioned, was of a very different complexion; and, although it received a contrary judgment, seems to approach very nearly to that of Mr Edmonston. It was as follows: Robert Cathcart claimed, at Michaelmas 1780, to be enrolled a freeholder of the county of Ayr, as apparent heir to John Cathcart, his father, in certain lands in that county; and, in order to prove his father's right to these lands, he, in his claim, referred to the following titles: *1mo*, Charter of the lands claimed on in favour of Hugh Cathcart of Carleton, dated March 29. 1703. *2do*, Disposition by Hugh Cathcart to Robert Cathcart of Genoch, his heirs and assigns, dated August 3. 1703. *3tio*, Retour of the general service of John Cathcart, the claimant's father, as heir to Robert



Robert Cathcart of Genoch, dated February 21. 1738. And, 4<sup>to</sup>, Instrument of sasine in favour of his father, proceeding upon the above mentioned charter, disposition, and retour. The freeholders took it for granted that all these different titles had actually been produced, and, accordingly, admitted the claimant to the roll; but it having been afterwards discovered that the disposition from Hugh Cathcart of Carleton to Robert Cathcart of Genoch, though an essential link in the progress, had not been produced, a complaint was preferred to the court of session, praying them to find that the freeholders did wrong in enrolling Mr Cathcart, and to order his name to be expunged from the roll; but, although Mr Cathcart did not venture to deny the ground upon which the complaint proceeded, viz. that he had not produced the disposition to his grandfather at the meeting of the freeholders, (which was indeed offered to be proved by his own oath), yet, upon his producing that disposition before the court of session, the complaint was dismissed\*. This gentleman's vote was likewise sustained by the committee of the House of Commons, appointed to try the merits of the election of the representative for the county of Ayr to the last parliament.

When a complaint is to be preferred against an enrolment, or against a refusal, upon the part of the freeholders, to sustain an objection for striking one off the roll, it is sufficient to make the person who has been enrolled, or has been allowed to continue upon the roll, a party to such complaint. In like manner, when one who has been refused to be admitted to the roll, or has been struck off, intends to complain, it is sufficient to call the person or persons who objected to his title in the meeting of freeholders. If the minutes are silent on that head, he must call all those who voted to sustain the objection; if that do not appear from the minutes, he must call all

\* March 6. 1781, Hamilton of Sundrum *contra* Cathcart.



all the freeholders who were present at the meeting, and a misnomer of any one of the persons complained of will be fatal to the complaint \*.

It being sufficient to call those freeholders in whose names an objection has been made, it may be thought, that, upon their withdrawing their opposition, the prayer of the complaint will be granted of course; but this were to open a door to collusion: The court of session does therefore wisely consider the complaint as a common cause of the whole body of the freeholders, and is wont, in such cases, to order the withdrawing or waving of the objections to be notified to the other freeholders by the sheriff of the county, at a meeting to be called by him for that purpose, in order that they may take them up, and bring the matter to a decision, if they think it proper to continue the suit. This was done in the case of St Clair and Sutherland *contra* M'Kay †.

When a complaint is moved in court, a warrant is granted for serving it upon the persons complained of. If they are residing in Scotland at the time, the service must be made personally, or at their dwelling places. If they are absent, it is sufficient that it be made at the market cross of Edinburgh, and pier and shore of Leith, the usual places at which all persons who are abroad are summoned to appear, when called in any action before the court of session. The warrant for service may be extracted immediately without abiding the course of the minute-book ‡; but the court has found, that an

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extract

\* See February 13. 1745, Dickson *contra* Gibson, and a case to be taken notice of in the sequel, January 1766, Alexander Young *contra* Andrew Johnston and others.

† January 17. 1765.

‡ The minute-book is a record in which all the decrees and interlocutory judgments of



extract is not absolutely necessary \*. Neither is it necessary that the service be made by a messenger at arms; nothing more being requisite than that the complaint be properly notified to the person complained of, and that evidence of such notification be produced to the court †.

It has been already mentioned, that those who stand upon the roll last made up, are the original constituent members of the annual meeting of the freeholders at the Michaelmas head court; and, in order to prevent abuses, the statute requires, that an extract of the roll made up at each meeting, and of the minutes of the proceedings, shall forthwith be delivered by the clerk of the meeting to the sheriff-clerk ‡, *gratis*, to be inserted by him in the sheriff's books kept for that purpose, which must be produced at the next meeting.

If the sheriff-clerk neglect or refuse to insert the rolls, or the minutes of proceedings, in the books to be kept for that purpose, or neglect

of the court of session are daily entered, in a compendious way, for the information of the practitioners before the court. All such decrees, and interlocutory judgments, must be entered in that book a certain number of days before they can be extracted, in order to be carried into execution.

\* July 5. 1747, burgeses of Rutherglen *contra* the magistrates; July 28. 1761, Mr Walter Stewart *contra* Mr David Dalrymple. It is, however, more regular to extract the warrant.

† This holds as to summary complaints in general. In the case of Rutherglen, the court found, that the rules prescribed by the act 1672, cap. 6. with regard to the execution of summonses, did not apply to such complaints.

‡ The statutes relative to elections talk always of the sheriff or steward, and of the sheriff or the steward-clerk; but, as these officers differ but in name, I shall, for the future, mention only the sheriff and sheriff-clerk.



neglect or refuse to give signed copies, or extracts thereof, to any freeholder who demands them, and is willing to pay the legal fee for an ordinary extract of the same length, or if he omit to produce the books at any subsequent meeting, he forfeits the sum of L. 100 Sterling, to be recovered by any freeholder within the county who will sue for it. And, in order that no prejudice may arise through the fault of the sheriff-clerk, the statute farther provides, that, in case the principal books, containing the rolls and the minutes, shall not be produced at any Michaelmas meeting, or meeting for election, a copy of the roll and minutes, extracted and signed by the sheriff-clerk, shall be sufficient to supply their place. Another penalty of L. 100 Sterling is likewise imposed upon the sheriff-clerk, if he give out false copies of the roll or minutes, extracted and signed by him; and by committing that offence he also becomes incapable for ever after of holding or enjoying his office.

The principal books, or, failing them, an extract of the roll last made up, being produced, the first thing to be done is to choose a preses and a clerk to the meeting; for which purpose the roll is called, and the votes asked by the commissioner last elected, *i. e.* the person who last represented the county in parliament, or, in his absence, by the sheriff-clerk. If, in the choice of preses or clerk, there happen an equality of votes, the commissioner last elected, and, in his absence, the freeholder present who last represented the shire in any former parliament, is entitled to the casting or decisive vote. If no such person be present, this casting vote is the privilege of the freeholder who last presided at any meeting for election; and, in his absence, it belongs to the freeholder who last presided at a Michaelmas meeting; and if no person be present who has either represented the county in parliament, or formerly presided at a Michaelmas meeting, or a meeting for election, it is allowed to the freeholder who

stands



stands first upon the roll among them that appear at the meeting \*.

The preses and clerk being thus chosen, the minutes of their election are signed by the commissioner last elected, or, in his absence, by the sheriff-clerk †, and delivered to the clerk of the meeting; after which, the freeholders proceed to take and subscribe the oaths of allegiance and abjuration, and to sign the assurance ‡. It is not, however, absolutely necessary to take the oath of abjuration, unless it be expressly required to be put by one of the freeholders present at the meeting, and those who refuse it are disabled from voting at that meeting. Quakers are not obliged to swear these oaths; it is sufficient that they declare the effect of them upon their solemn affirmation §.

The clerk chosen to the meeting likewise qualifies to government, by taking the oaths now mentioned, after which the freeholders proceed to purge, or clear, the roll, by striking out the names of those

\* This part of the statute, if strictly interpreted, applies only to meetings for election; but the same rule is, in practice, observed at the Michaelmas meetings.

† The sheriff-clerk may be unable to attend, or the office may be vacant, and it may be asked by whom, in that event, is the roll to be called for the choice of preses and clerk, and the minutes of their election to be signed, if the commissioner last elected be absent? The statute has made no provision for such a case; but, were it to happen, I should think it proper to follow the same order which the act has appointed with respect to the casting vote: For greater security, the minutes may also be signed by all the electors of the preses and clerk.

‡ Although it is customary to choose the preses and clerk before taking the oaths to government, these oaths must be previously taken, if required to be put by any freeholder present at the meeting, 7mo Geo. II. cap. 16. § 10.

§ 7mo Will. cap. 34. 6to Annae, cap. 24.



those who may have died since the former meeting. They then consider the objections made to those who stand upon the roll, if any such have been lodged, and next take up the claims that are presented for enrolment \*; and judgment being pronounced upon these claims according to the votes of the majority, a new roll is made up, and an extract thereof given to the sheriff-clerk, as already mentioned, the preses of the meeting having the casting vote in every question where there is an equality.

This is the rule of procedure at the Michaelmas meetings; and, so far as regards the revising of the roll, and making the necessary alterations upon it, the same rules are followed at meetings for election.

To prevent surprise, and to give the freeholders an opportunity of fully considering the business that is to come before them, it is, by the same statute, appointed, that every person who has it in view to be enrolled at a Michaelmas meeting shall, at least two kalendar months before that meeting, leave with the sheriff-clerk a copy of his claim, setting forth the names of his lands, and the nature and dates † of his titles, together with the old extent or valuation on which

\* This is surely the most regular mode of procedure; but, as it is not positively enjoined by any statute, the very reverse has, upon some occasions, been adopted by freeholders.

† The statute is equally explicit in respect to the dates of the titles as with regard to any other requisite. It has not, however, in this particular, been rigidly interpreted. In the case of Ogilvy of Clova *contra* Coutts of Halgreen, the court of session repelled the objection, that the date of the claimant's retour was not mentioned in the claim; and, in the case of Skene of Skene *contra* Graham of Flemington, an objection, that the date of one charter was altogether omitted, and that of another erroneously stated, was likewise repelled. These cases were decided in 1768, and, in the last, the dates of the instruments



which he desires to be enrolled, and, if he neglect to do so, he cannot be enrolled at that meeting. In like manner, those who intend to object to any freeholder who stands upon the roll, on account of an alteration in his circumstances, must, two kalendar months before the meeting, leave their objections in writing with the sheriff-clerk, who, by the statute, is required to indorse upon the back of the claims or objections so left with him, the day of his receiving them, and to give copies to any person who demands them, upon their paying the legal fee of an ordinary extract of the same length \*. This regulation, however, only applies to Michaelmas meetings; and one may be either enrolled, or struck off the roll, at a meeting for election, without any claim or objection being previously lodged with the sheriff-clerk.

A claim bearing, by mistake, that the claimant's sasine was recorded in one register, when, in fact, it had been recorded in another, an objection made on that head was sustained †. This was a just decision. Claims are ordered to be lodged with the sheriff-clerk in order to prevent surprise; but a claim that does not lead to a discovery of the claimant's infestment cannot answer that purpose.

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struments of sasine were distinctly set forth; and from them the freeholders could discover the true dates of the charters. In a subsequent case, where the claim of an apparent heir neither mentioned the dates of his predecessor's titles, nor the names of all the lands, the court sustained the objection, although the titles themselves were lodged along with the claim left with the sheriff-clerk, and although the predecessor had been enrolled upon these titles; March 3. 1773, *Mr Cosmo Gordon contra Abernethy of Mayen*.

\* This rule holds although the alteration of circumstances happen within two kalendar months of the Michaelmas meeting. It is a general rule; and the person must continue upon the roll for another year, unless he shall voluntarily agree to his being struck off.

† January 5. 1762, *Goldie*.



It was once objected to a claim lodged in due time with the sheriff-clerk, that it did not mention the precise sum at which the lands were valued, but only bore that their valuation exceeded L. 400 Scots: But that objection was most justly repelled \*.

It was also objected to an enrolment, that the claim had not been lodged with the sheriff-clerk till four of the clock in the afternoon of the 6th of August, and that the freeholders convened at the Michaelmas head court upon the 6th of October before two of the clock; but to this it was held a sufficient answer, that, in all cases of legal notice, it is only required that the day on which the notice is given, or the day to which it is given, be free, but not both; and that, if either the 6th of August, or the 6th of October, were reckoned, the full period of two kalendar months would be found to have run; a kalendar month being from any day in one month to the same nominal day in the next †.

It was likewise determined in a meeting of freeholders, that an objection to a person's continuing upon the roll, though lodged with the sheriff-clerk in due time, could not be taken under consideration, because it neither was signed by any person, nor mentioned by whom, or in whose name it was given in: But, as none of these things are required by the statute, and as it is in itself a matter of no consequence whether an objection be signed or not, or by whom it is lodged, the court of session had no difficulty in reversing this judgment ‡. The sheriff-clerk is, however, under no obligation to

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\* January 16. 1754, Sir Archibald Grant *contra* Leith of Leithall.

† January 15. 1761, Elliot of Arkleton *contra* Fergusson of Craigdarroch.

‡ 1767, Ranken of Colden, and Irvine of Burleigh, *contra* Ramfay of Kinkell and Colvil of Ochiltree.



lay the objections that are lodged with him before the freeholders, nor are they bound to take any notice of them, unless some person insist on their being taken under consideration. The same observations are equally applicable to claims for enrolment. The statute requires only a copy to be left with the sheriff-clerk; and it is not even necessary that the principal claim produced to the freeholders be signed. Neither is it necessary for claimants to attend in person at the meeting of the freeholders. They may appoint any other to appear for them; and the production of their titles implies a mandate, and a sufficient authority to the producer of them to prosecute their claims. It has indeed been made a question, Whether a special mandate be not necessary from a claimant who is at the time abroad? In a case where the claimant was in America, and no mandate was produced from him, the freeholders rejected the claim on that ground; and although the court of session, in a complaint preferred in the name of the claimant, when still abroad, and without any authority from him, at first reversed the judgment of the freeholders, and ordered him to be added to the roll, they, upon a reconsideration of the case, altered that judgment, and approved of the determination of the freeholders \*.

It is natural when no party work is going on, to take up the consideration of the several claims for enrolment in the order of the dates of their being lodged with the sheriff-clerk; but it is not necessary to observe that order; and the freeholders have in that matter a discretionary power, which is generally exercised in the manner best suited to the views of the majority of the meeting.

Where two persons are enrolled upon the same lands, the one as fiar and the other as liferenter, they ought to be distinguished in the roll

\* July 20. 1780, Ferguson *contra* Major Dundas.



roll, by adding the words *fiar* and *liferenter* to their respective names. It is also the practice to insert the names of the liferenter and fiar in the roll together, beginning with the liferenter, as having the preferable right of voting. This is done even when the liferenter is the last claimant, which seems to hurt the regularity of rank in the roll \*.

The freeholders have no power to review or alter at one meeting the proceedings of a former meeting. In the roll made up for the county of Kinross in 1753, General Irvine of Burleigh was, by a mistake of the clerk, put at the foot of that roll, although he had been enrolled before another freeholder, Mr Ranken of Colden. The General made no complaint on that head; but, at a subsequent meeting, held at Michaelmas 1766, where only two freeholders were present, the preses, who had thereby two votes to one, ordered the roll to be rectified, and General Irvine's name to be inserted before that of Mr Ranken. But this order was reversed by the court of session, who were of opinion, that, as no complaint had been brought within four kalendar months after the Michaelmas meeting 1753, the order of the roll made up at that time could not be altered †.

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\* See January 1772, Earl Fife *contra* General Grant.

† January 23. 1767, Ranken of Colden *contra* Ramsay of Kinkell. Since the statute of the 16th of Geo. II. place or precedency on the roll is of some consequence, as, in certain cases, it entitles to a casting vote. The depriving a freeholder of his place in the roll is therefore a wrong, but it may justly be doubted if he can competently apply for redress by a summary complaint to the court of session, for which, in such a case, no provision is made by statute. A declaratory action is certainly a more proper mode of procedure. The incompetency of a summary complaint was accordingly objected by Mr Ramsay; and, in order to obviate that objection, Mr Ranken brought an action of declarator against Mr Ramsay and General Irvine, in which he concluded, that



But, although the freeholders cannot, at their own hand, strike a person off the roll without an alteration of his circumstances, there is nothing to prevent them from enrolling one upon titles which had been rejected at a former meeting. At the election for the county of Ayr upon the 13th of October 1774, several persons were enrolled whose claims had been rejected at the Michaelmas meeting held upon the 4th of the same month; and, at the election in the same county, *anno* 1780, many claims were brought forward which had been rejected only ten or twelve days before at the Michaelmas head court.

The law does not require any definite number of freeholders to make a quorum. Even one freeholder may constitute a meeting, and go through the business either at Michaelmas or at an election \*; but, if he admit any person wrongfully to the roll, any of those

that it should be found and declared that he was entitled to hold his former place in the roll. This action was accordingly taken up along with the complaint; and, although the court ordered Mr Ranken to be restored to his former place, they gave no order to the sheriff-clerk to carry their decree into execution. It was left to the freeholders themselves to give obedience to the decree; and, indeed, the sheriff-clerk is only bound to act in those cases where he is particularly required to do so by statute.

\* An instance of this happened in Orkney some time ago. At the Michaelmas head court of that county for the year 1760, only one freeholder attended. Five claims for enrolment having been previously lodged with the sheriff-clerk, the several claimants produced their titles, and were admitted to the roll. Some weeks after, complaints were preferred against these enrolments, in the name of another freeholder, who objected to the legality of the meeting, in respect that it was held only by one freeholder. Before an answer could be put in to these complaints, an election of a commissioner took place; and, as the names of the five gentlemen who had been admitted at the Michaelmas preceding stood upon the roll which had then been made up, the sheriff-clerk, whose province it was, in the absence of the commissioner last elected, to call the roll for the choice of preses and clerk, refused to call that roll, and called another that had been made up in 1754. This produced new complaints, at their instance, for recovery



those who were absent may prefer their complaint to the court of session.

The freeholders ought to meet regularly every year at the Michaelmas head court. There is, however, no method of compelling their attendance. What then is to be done, if, with a view to disappoint one or more persons who have lodged claims for enrolment, they all forbear to attend? I know of no remedy. The case happened in 1753, in the county of Cromarty; but, although a complaint was preferred by a gentleman who had lodged a claim with the sheriff-clerk two months before the day upon which the meeting should have been held, and although it was strongly argued that there could be no wrong without a remedy, the court of session refused to interpose in his behalf, and dismissed the complaint as incompetent \*. They, indeed, had no power to judge of the claim in the first instance, having no original jurisdiction in matters of enrolment, and they had as little authority to order the freeholders to assemble for the purpose of taking the claim under their consideration.

## CHAPTER

covery of the statutory penalties to be hereafter taken notice of; and the court, upon advising these complaints, gave judgment in favour of the complainers, and also dismissed the complaints which had been previously brought against their enrolment.

1762, Mackay of Strathy and others, *contra* John Riddoch and others.

This, however, was not the case in former times; for, as the statute 1587 required the commissions to the representatives of counties to be sealed and subscribed by at least six of the freeholders, we may conclude, that no smaller number could constitute a quorum, at least at a meeting for election. See *Sir George M'Kenzie's Observations*, page 258.

\* December 20. 1753, Mackenzie of Highfield *contra* freeholders of Cromarty.



## CHAPTER II.

*Of the Qualifications necessary to entitle a Person to be enrolled a Freeholder.*

HAVING considered the manner in which the freeholders proceed in making up the roll of their number, the next point in order is, to show what qualifications the law requires to entitle one to be admitted upon that roll.

When James I. of Scotland dispensed with the attendance of the small barons, and allowed them to send commissioners to parliament, no restraint was imposed; every person who held of the King being left at liberty to vote in the choice of these commissioners, how small soever his estate or freehold might be. But, by the statute of James VI. which first brought this representation of the small barons to a regular bearing, none were admitted to vote but those who had a forty shilling land in free tenandry, and had their actual residence or dwelling within the shire. By the act 1661, this privilege was extended \* to all those who were possessed of lands holding of the King of ten chalders of victual, or L. 1000 of real rent. This, however, was altered by the act 1681; and, in the place of the real rent, a new kind of qualification was introduced, which was to be regulated by the valued rent; for it was then enacted, that  
none

\* The word *extended* may seem to be improperly used here; but it is not; for many might be possessed of a rent of ten chalders of victual, or L. 1000, who could not show that their estate was a forty shilling land of old extent.



none should be allowed to vote but those ' who stood publicly infest  
' and possessed of a forty shilling land of old extent, holden of the  
' King or Prince, distinct from the feu-duties in feu-lands, or, where  
' the extent did not appear, stood infest in lands liable in public  
' burdens for his Majesty's supplies for L. 400 of valued rent,  
' whether kirk-lands now holden of the King, or other lands hold-  
' ing few, ward, or blench, of his Majesty, as King or Prince of  
' Scotland.'

This act, which also repealed the statute of James VI. in so far as it required actual residence within the county, was the standing rule at the time of the union, and is, in a great measure, so at this day. The few alterations that have been made upon it will be fully taken notice of in the sequel.

The qualifications of a freeholder, in so far as they relate to the title, may therefore be reduced to the following: *1<sup>st</sup>*, That the land upon which the right to vote is claimed, be either a forty shilling land of old extent, or amount to L. 400 Scots of valued rent. *2<sup>dly</sup>*, That such land be held by the claimant immediately of the King or of the Prince. *3<sup>dly</sup>*, That the claimant be infest. And, *4<sup>thly</sup>*, That he be in possession.

Each of these shall be considered in its order.

The first divides into two branches; the forty shilling land of old extent, and the land of L. 400 of valued rent.

In order to explain what is meant by a forty shilling land of old extent, it will be necessary to enter a little into the antiquities of the law of Scotland.

Land



Land is the first object that presents itself for taxation. A state is well advanced before customs or an excise are thought of.

To render a tax upon land equal, a general valuation becomes requisite. Such a valuation was likewise necessary in Scotland on another account, namely, for the purpose of ascertaining the non-entry and relief duties payable to over-Lords, or superiors, by their vassals.

At what time a general valuation first took place in Scotland cannot with certainty be discovered; but that one had been made before the reign of Alexander III. appears from a record intituled, 'Rentale Regis Alexandri tertii vicecomitat. de Aberdene et de Banff,' which contains this article, 'De thanagio de Nathdole secundum antiquam extentam 49 lib. et 16 denar.;' for a valuation made during that Prince's reign could not then have been termed old or ancient \*.

But, even supposing a new valuation to have been made in the reign of Alexander III. who had occasion for an extraordinary subsidy to enable him to pay his daughter's portion, upon her marriage with the King of Norway, and also, supposing that valuation to have exhibited a real state of the rents of the several lands of the kingdom at that time, yet, as great part of the country was laid waste, during the wars with England after the death of that Prince, so these wasted lands must necessarily have sunk in their value, and could not be expected to yield, at least for some time, their former rent. Hence, when a grant of a tenth of the rents of the laity was imposed in 1326, to continue during the life of King Robert Bruce, it was thought reasonable that the owners of such lands should not be rated

\* Annals of Scotland, vol. 1. page 184.



rated at the old valuation, but should be allowed an abatement, which was to be settled by a jury \*. This brought on a revaluation of these particular lands, and made a distinction, even in those days, between old and new extent.

It soon became customary to require the inquest or jury called in the services of heirs by briefs of mortancestry, to ingross in their verdict, or retour, as it is called in the language of the law of Scotland, the valuation of the lands in which the heir's predecessor died infest. The retours of lands which had not been revalued, could bear no other valuation but that which subsisted in the reign of Alexander III. ; but, where the lands had been revalued in the time of Robert Bruce, after 1326, the retours mentioned both valuations, and set forth the old extent, or *quantum valuerunt tempore pacis*, and the new extent, or *quantum nunc valent*.

It is plain, that, at this period, the new extent must have been lower than the old ; but, as the particular lands which had been laid waste would, in process of time, recover, and as the lands throughout the kingdom, in general, came to be improved in their value, the reverse must have taken place after a new general valuation was made up.

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\* This we learn from the indenture formerly mentioned between Robert Bruce and the Earls, barons, freeholders, and burghesses, in which the tenth given to that Prince was ordered to be levied, 'juxta antiquam extentam terrarum et reddituum tempore memoriae Domini Alexandri, Dei gratia, Regis Scotorum illustris ultimo defuncti, ex-cepta tantummodo destructione guerrae, in quo casu fiet decidentia de decimo denario praeconcesso, secundum quantitatem firmæ, quae occasione prædicta, de terris et redditibus prædictis levare non poterit, prout per inquisitionem per vicecomitem loci fideliter faciendam poterit reperiri.'



At what time a general revaluation was made, is not agreed upon. The author of the Historical Law Tracts conjectures \*, that matters continued upon the old footing till 1424, when a subsidy became necessary for paying what was due to England for the subsistence and education of James I. †. But, from retours prior to that period, and mentioned in Mr Erskine's Institute of the Laws of Scotland ‡, we learn, that a revaluation must have been made before that time, as, in these retours, the new extent is higher than the old ; and that author observes, that no period appears more likely for this than the year 1365, or 1366, when a tax was to be imposed for the ransom of David II.

It is, however, certain, that a revaluation took place in 1424 || ; but, although the extent or value thereby ascertained came to be considerably higher than the old extent in the time of Alexander III. yet the gradual improvement of land, and the rise in the nominal value of money, soon rendered even it too low a standard for fixing the casualties of superiority. It was therefore ordered by an act of James III. 1457, cap. 56. that all retours should specify both the old extent and the precise avail (value) the lands were worth at the time of the inquest's serving the heir to his predecessor ; and this last has ever since been called the new extent.

According to this statute, a proof of the real worth of the lands ought to be taken at the service of every heir ; and this practice was no doubt followed for some time ; but it was too troublesome, and came to be looked upon as too unfavourable to vassals to be long continued.

\* Vol. 2. page 204.

† Black Acts, fol. 3. parl. 1424, cap. 10. 11.

‡ Page 225.

|| Black Acts, fol. 3. parl. 1424, cap. 11.



continued. After lands had once been valued according to the directions of the statute, it was customary for the inquest, in subsequent services, to return the sum at which the new extent had been fixed in such first retour, as the *nunc valent* of the lands; and we are informed by Skene \*, that, where the new extent had not formerly been retoured, it was generally fixed at the quadruple of the old extent †. He, however, adds, that this rule was not perpetually observed. It is probable that different proportions were adopted in different counties. Balfour says upon this subject ‡, ‘ And it is to wit, concerning the difference betwixt the auld extent and the new extent, that generallie ane merk of auld extent sould be estemit to ane pound of new extent.’

Such being the distinction between the old and new extent, it need only be farther remarked, that none of the valuations above mentioned extended over church-lands. The proportion of subsidies payable by the clergy was fixed by different rules. Their revenues were subjected to an equal moiety of all taxations upon land ||, the

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burden

\* De verborum significatione, voce Extent.

† The justness of this proportion is, in some degree, confirmed by a warrant from Queen Mary, directed to the sheriff of Aberdeen in 1548, for summoning an inquest to retour all the lands in that county, as well church-lands as temporal lands, and the patrimony of the crown; for it directs that the lands which then gave of yearly mail and duty (*i. e.* rent) four pounds, should be returned to twenty shillings of old extent, without any exception or regard to any former retour. A copy of this warrant is to be found in the Appendix, No. 30.

‡ Practicks, page 430.

|| Several instances do however occur, in the statute book, of a different proportion being observed in laying on taxes imposed for particular purposes, where the clergy were only burdened with two-fifths, the barons with other two-fifths, and the boroughs with one-fifth. See *Black Acts*, fol. 67. 71. 96.



burden whereof was divided amongst them in proportion to the value of the several benefices, as they stood upon a roll called *Bagimont's roll* \* ; and, as the church never died to make place for the casualties of non-entry or relief, or to give occasion to retours, there was no room for ascertaining either the old or new extent of church-lands. The first instance I have found of a warrant for retouring, or, to speak more properly, extending or valuing church-lands, is that mentioned in the preceding note by Queen Mary in 1548; and, although this order seems to have been made with a view that the extent of all the lands in the county might be known, little regard was paid to it by the churchmen, or their chamberlains, who, as is said in the retour, 'compeared not, albeit they were lawfully required and warned thereto by my Lord sheriff's precept.' It appears, however, to have been the intention of the legislature, after the act of annexation in 1587, that the church-lands should pay the land-tax in the same manner with the temporal lands; for, by the act 1594, cap. 233. it was expressly ordered, 'That all few-lands annexed to his Majesties crown be the act of annexation remain with his Majesty and crown in all time hereafter; and that all few-lands annexed, or other few-lands quhatsoever, within this realme be retoured and availed to marke or penny lands, that his Majesty may know the awner thereof; and being retoured that quhen it fall happen ony impost or taxation to be

\* This roll contained a full rental of all the benefices in Scotland, as well temporality as spirituality. It is referred to in some acts of the parliament of Scotland, particularly 1471, cap. 43. and 1494, cap. 39. as a standard not to be altered; and severe penalties were, by these acts, imposed upon those who should give information, at the court of Rome, of any higher value of benefices than what was there set down. Bishop Lesley, through a strange mistake, mentions Bagimont as present in a provincial council held at Edinburgh in 1512, at which he says this roll was made up; whereas, in the first of the two acts above quoted, it is termed the *auld roll of Bagimont*. He, in fact, came to Scotland in the year 1276. *Annals of Scotland*, vol. 1. page 180.



‘ be raised, that the saidis fewares shall be charged according to their  
‘ retours.’ In consequence of this act, some church-lands were re-  
toured, and particularly the Lordship of Culrofs, as early as the year  
1598, in virtue of a special commission under the great seal \*; but  
this notwithstanding, we find, that, upon the first taxation imposed  
after 1594, it was expressly ordered †, that all erections of pre-  
lacies into temporal lordships, and all dissolved benefices, should  
be subject to payment of so much of that taxation as they would  
have been subjected to, if no such erection or dissolution had taken  
place ‡. We likewise learn from an unprinted act of the year 1612,  
that the same rule was observed in the taxation then imposed for  
the payment of the Princess Elizabeth’s portion; and, in fact, it  
continued to be observed down to the time of the troubles in the  
reign of Charles I. when a new mode was introduced of levying  
the land-tax, by monthly assessments, according to valuations which  
were then made, and will be more particularly taken notice of in  
the sequel.

Having thus endeavoured to explain what is meant by the old  
extent mentioned in the act 1681, I shall now proceed to consider  
what

\* In a list of all the lands of Scotland which paid taxations according to the old ex-  
tent, made up in 1612 by commissioners appointed for that purpose, and still preserved  
in the records, only two instances are to be discovered of church-lands being extended,  
and of these the Lordship of Culrofs is one.

† 1597, cap. 281.

‡ We cannot well suppose that this was done by way of favour to the Lords of  
Erection, or those who had obtained grants of church-lands, and may therefore con-  
clude, that the clergy were understood to pay their full proportion of the land-tax,  
when one moiety was imposed upon them; and this would hold more especially after  
the reformation, when, out of their revenues, proper stipends were allotted to the mini-  
sters serving the cure.



what evidence a person who claims to be enrolled upon a qualification of that sort must bring, in order to show that his lands are truly a forty shilling land of old extent.

The act 1681 is silent upon this head; and, prior to the act of the 16th of George II. cap. 11. any satisfactory evidence of the fact might be resorted to; but by that statute it was expressly declared \*, that no person should be entitled to vote for a commissioner to serve in any parliament for any shire in Scotland, or to be enrolled in the roll of electors, in respect of the old extent of his lands, unless such extent were proved by a retour prior to the 16th of September 1681; and that no division of the old extent made since that day by retour, or any other way, should be sustained as sufficient evidence of such extent †. No series of charters, however long and uninterrupted, can

\* Sect. 8.

† Whatever may have been the real object which the framers of the statute had in contemplation by this clause, the reason given in the act itself for imposing these restraints, viz. 'That great difficulties had occurred in making up the rolls of electors of commissioners for shires by persons claiming to be enrolled in respect to the old extent of their lands, when the old extent did not appear from proper evidence, and votes had been unduly multiplied by splitting and dividing the old extent of lands since the 16th of September 1681,' does not appear to be altogether satisfactory. If a claimant was not able to bring proper evidence of his old extent, the freeholders were under no obligation to admit him to the roll, and, if they did admit him, the court of session, upon a complaint, could order him to be struck off. Why then exclude every other evidence but that of a retour prior to the 16th of September 1681? Had all the old retours of services been preserved, or had a regular record of them been extant, there might have been less ground of complaint: But that was by no means the case. There never was a record of retours established by public authority; and I have been informed, that no regular record of that sort took place till the year 1633, when Sir John Scot of Scotstarvet, who was then director of the chancery, instituted one for recording not only the retours in time to come, but even



can therefore now be admitted to show the old extent, or supply the want of a retour \*; nay, even a retour itself, although in the description

even those in time past, for which purpose he was at great pains to collect from private hands the original services, which were formerly delivered back to the parties when they obtained their precepts for infeftment, nothing being kept in chancery but the brieve and the executions. In this search Sir John was pretty successful, and got a great many old services, but none prior to the year 1546, although there are some still extant older than the year 1400. These he recorded as they came to hand; and hence we find in the books for the years 1633, and 1634, some as old as 1546. We may, however, well suppose, that the greatest number of the old retours must have been lost before this record was begun; and it is a certain fact, that many persons are able to show a progress of titles to their lands for 100 or 200 years prior to the beginning of the last century, without having among them a single retour, although they are possessed of many fines proceeding upon retours. This statute of the 16th of George II. by cutting off every kind of evidence of the old extent but retours prior to 1681, did therefore deprive many who were truly possessed of a forty shilling land of the right of being admitted to the roll, notwithstanding their having a title equally good with those who could prove their extent by such retours, and notwithstanding that the evidence arising from their charters was equally satisfactory, the extent being therein mentioned, and no person being under any temptation (especially in more ancient times, when the service of parliament was considered as a burden rather than a privilege) to ask a higher extent to be inserted in his charter than the just one, according to which he was to be liable in payment of the land-tax. This seems to be somewhat unreasonable, because unequal; and the preventing a freeholder from dividing his old extent, the consequence whereof is, that, although he be possessed even of a L. 20 land, yet, if he sell but a tenth part of it, neither he, nor the purchaser from him, can be admitted to a vote, appears to be equally unjust. It is highly proper to guard against the rearing up of nominal and fictitious, or occasional votes; but the political constitution of Scotland, even before the date of this statute, was such as to remove any apprehension of evil from an increase of real and fair freehold qualifications. I have indeed been told, that this clause of the statute was calculated to prevent much jobbing, then said to have been carried on, by taking out brieves for dividing extent from the chancery, and by making these divisions according to certain rules framed by the exchequer, which it was thought put too much power in the hands of certain officers, and of other persons who were supposed to have an influence over them.

\* February 22. 1745, Sir Michael Stewart *contra* Hugh Crawford.



description of the lands, it mention them to be a four or five pound land, will not be sufficient, unless the extent be particularly set forth in the *valent* clause \*: But a retour of several lands valued together, which mentions their respective values in the descriptive clause, and gives the sum total in the *valent* clause, is held to afford sufficient evidence of the extent of each particular land, if the sum total so mentioned in the *valent* clause agree with the several values in the descriptive clause when added together †. This is most just; for, when the two clauses thus tally, there is every reason to presume that each separate parcel has been properly described in the former clause, according to its true extent ‡.

Even although there be a small discrepancy, the descriptive clause is received as a proof of the old extent. In an ancient retour of the Dukedom of Lennox, the values of the several lands, as stated in the descriptive clause, when added together, amounted only to L. 515 : 16 : 8, whereas the total, or, as it is called, *cumulo* extent of the whole, was mentioned in the valent clause to be L. 517 : 3 : 4.

But

\* February 22. 1745, Sir Michael Stewart *contra* Campbell of Ellersly.

† By a *retour*, in the language of the election law of Scotland, is generally meant the verdict, or return of a jury to a *brieve of mortancestry*: I say *generally*, because the returns of juries declaring the extent of a whole county are also termed *retours*, and are equally probative of the old extent of the several lands lying within such county; but, when we talk of a *descriptive* and of a *valent* clause, we have only in view the first species of *retours*. The *descriptive* clause is that which, in the first part of the *retour*, sets forth the several lands in which the predecessor died *vest* and *seised*; and the *valent* clause is that in which the jury particularly return the worth or extent of the lands. It is commonly done in these terms: ‘*Et quod praedict. terrae valent nunc per annum et valuerunt tempore pacis* *monetae praedict.*’

‡ January 18. 1745, Campbell of Succoth *contra* freeholders of Renfrew. 1775,  
Lieutenant Goldie.



But an objection founded upon this discrepancy was over-ruled by the court of session \*. Similar judgments were pronounced in the cases of Edward Maxwell from the stewartry of Kirkcudbright †, and of John Barns from the county of Ayr ‡, in both of which the valent clause exceeded, by a trifle, the sum total of the joint values put upon the several lands in the descriptive clause, which, in all of these cases, also mentioned each different parcel only as a twenty shilling or a merk land, and so furth, without the addition of the words *antiqui extentus*.

It may, however, be asked, What judgment ought to be pronounced when the valent clause, instead of exceeding, falls short of the joint values affixed to the several lands in the descriptive clause? When such is the case, there is some ground for maintaining that the descriptive clause must be erroneous as to one or other of the different parcels of land, and that it being impossible to discover where the error lies, none of them ought to be held of the extent or value put upon them in that clause: Much nicety is therefore requisite. If there appear reason to believe that the discrepancy arises from an error in summation, it is not regarded, especially if it be so small, that, after deducting it from the value allotted to the parcel of land upon which the vote is claimed, there will still remain forty shillings of old extent. The court of session accordingly sustained two qualifications in the county of Ayr, although the valent clause of the retour produced in proof of the old extent made

Y the

\* February 5. 1745, Colquhoun of Lufs *contra* freeholders of Dumbartonshire. A most formidable attack upon the evidence of this retour of the Dukedom of Lennox was renewed on occasion of the general election in 1780; but it was again sustained. January 23. 1781, General Fletcher *contra* James Ferrier.

† 1775, Maxwell.

‡ December 5. 1780, Barns *contra* Hamilton of Sundrum.



the whole land therein contained amount only to L. 11 : 2 : 0 ; whereas the values affixed to the several parcels in the descriptive clause, when added together, extended to L. 11 : 8 : 8, shewing an excess of 6 sh. 8 d. That excess, however, either of the parcels claimed upon might spare, the one being called a L. 3, and the other a L. 2 : 13 : 4 land of old extent \*. But, if the shortcoming of the valent clause be so considerable as that it may reduce the particular lands upon which the vote is claimed under forty shillings, if applied to them, the objection should seem to be good.

It may perhaps be thought that some of the judgments above taken notice of are inconsistent with a decision pronounced by the court of session in the year 1774, in the case of Murray of Broughton *contra* Clerk. In fact, however, there is no inconsistency, nor did the court, in that case, depart from the principles which it assumed in determining the case of Mr Campbell of Succoth, and others of a similar nature.

In the case here referred to, the descriptive clause of the retour bore, that Robert Earl of Nithsdale died last vest and seised ' in toto  
' et integro officio balivatus omnium et singularum terrarum et possessionum ad monasterium de Sweatheart pertinen. jacen. infra vicecomitatum de Dumfries predict. ac quarumcunque aliarum terrarum ubicunque infra hoc regnum Scotiae ad dict. monasterium pertinen. existen. una cum quinque mercatis terrarum de Loch-  
' arthur, et pertinen. earundem, jacen. infra baroniam de Lockkiddiloch et fenescallatum de Kirkudbright pro dicti comitis feodo in  
' usu et servitio dicti officii balivatus.' The valent clause bore, ' Et  
' quod dict. officium balivatus monasterii de Sweatheart, cum dictis  
' terris

\* March 7. 1782, Lieutenant Colonel Ferrier *contra* Graham. *Eodem die*, James Ferrier *contra* Eundem.



‘ terris de Locharthur pro feodo et salario in usu dict. officii nunc  
 ‘ valent per annum summam undecim mercarum monetae predict.  
 ‘ et tantum valuerunt tempore pacis:’ And the question was,  
 Whether this retour afforded sufficient evidence of the separate old  
 extent of the lands of Locharthur, exclusively of the office of bailie?  
 In order to show that it did not, it was maintained, that there was  
 no correspondence betwixt the descriptive and the valent clause,  
 without taking it for granted that the office had been extended to  
 six merks, but that of this there was no evidence from any part of  
 the retour, and therefore the description of the lands, as a five merk  
 land, might have been erroneous. The court accordingly sustained  
 the objection.

It is not necessary that the principal retour itself be extant. Ex-  
 tracts from the record in chancery, which, although not originally  
 instituted by public authority, has obtained full credit in the courts  
 of law, are sustained as sufficient evidence of the old extent \*. But  
 a certificate under the hand of one of the keepers of the public re-  
 cords, bearing, that, upon searching a record of old extent, made  
 up in 1613, he found the lands upon which a claim had been en-  
 tered for enrolment extended in that record to L. 8 : 8 : 2, was not  
 held to be a proper proof of the old extent in terms of the statute †.

Y 2

The

\* February 5. 1745, Colquhoun of Lufs *contra* freeholders of Dumbartonshire.  
 July 28. 1761, Stewart *contra* Dalrymple. July 29. 1761, Mackie of Barmore *contra*  
 Sir William Maxwell and others. In the case of Tytler of Woodhouselee, who, for proof  
 of his old extent, referred to an extract, from the record in chancery, of a retour made  
 up before the sheriff of Edinburgh in 1554, of all the lands within the county, it was  
 objected, that this record concluded with the words *in cujus rei testimonium*, without  
 bearing that the seals of the jurors were appended, or mentioning the name of the  
 clerk, or his subscription. But this objection was repelled, November 19. 1755,  
 Chalmer *contra* Tytler.

† February 17. 1767, Sir John Gordon *contra* This judgment was  
 affirmed in the House of Lords, May 4. 1767.



The statutes require a forty shilling land of old extent. In 1766, a freeholder claimed to be enrolled upon two separate parcels of land, the extent of each of which was proved, by a retour prior to the year 1681, to be twenty shillings. The freeholders refused to admit him to the roll; but the court of session reversed their judgment\*.

Lands on which a person claimed to be enrolled, being proved by a retour prior to 1681, to have been extended along with an annualrent of one merk out of certain other lands, to ten merks, the retour was held to be sufficient evidence that the lands were of the extent required by law to the constitution of a freehold qualification; for, as annualrents are always retoured *valere se ipsos*, there was a clear proof from the retour that the lands, without the annualrent, were nine merks of old extent†.

It has been generally believed that mills were not extended, or, in other words, that no value was put upon them at the time of making any of the general valuations of Scotland, which are now called the *old extent*; and the court of session has accordingly, upon different occasions, repelled objections to the evidence of retours founded upon the idea, that a part of the *cumulo* extent mentioned in the valent clause must have been applicable to a mill. It is, however, a certain fact that some mills were extended. One instance is to be found in Rymer's *Foedera*, vol. 4. page 670.; and the present Earl of Dalhousie has in his possession a retour as old as the 5th of November 1547, in which the mill of Carridden, together with

\* January 23. 1767, Sir Michael Macolm *contra* Ramsay of Kinkell. A similar judgment had been pronounced about ten years before in the case of Hamilton Blair *contra* freeholders of Renfrew.

† November 20. 1757, Fordyce *contra* Urquhart. An *annualrent* is a technical expression in the law of Scotland to denote a real security given upon land for payment of a certain sum annually. It is also often made use of instead of the word *interest*.



with the mill-hill, the aqueduct, and its other pertinents, are extended to forty shillings \*. The author of the Historical Law Tracts likewise takes notice of a retour, or valuation of the lands of Kilravock and Easter Geddes, *anno* 1295, in which the valent clause runs thus: 'Quod terra de Kilravock cum omnibus pertinentiis suis, scilicet, cum molend. bracinis quarrellis et bosco valet per annum 24 lib.; item dixerunt quod terra de Estir Geddes cum molend. et bracinis valet per annum 12 lib.'

It is not a good objection to a retour that there were not fifteen jurymen upon the inquest. Although that is the ordinary number, it is not necessary that there should be so many: And, in the records of chancery, we find, in the short period of ten or eleven years, from 1619 to 1630, no fewer than twelve different retours having twelve persons on the jury, four having only eleven, and one having only ten upon it †. The greatest number found in any retour yet seen is nineteen.

In consequence of the enactment of the statute of the 16th of George II. that no division made since the 16th of September 1681, either by a retour, or in any other way, should be received as evidence of the old extent, the court of session found, that a twenty merk land being divided into two moieties, and vested in two different proprietors, neither of them had a title to be enrolled, although the division had taken place by a voluntary contract as old as 1671, which mentioned the particular extent of the several farms, making up ten merks to each moiety ‡.

It

\* A copy of this retour is inserted in the Appendix, No. 31.

† See July 28. 1761, Stewart *contra* Dalrymple; and January 15. 1762, Stewart *contra* Sir William Maxwell.

‡ February 6. 1745, freeholders of Lanarkshire *contra* Hamilton of Westburn.



It was objected to a retour, that it could not be received as evidence of the old extent, because, at the time of its date, the lands were held of a subject superior. In support of this objection, it was pleaded, that, although from the circumstance of the taxations imposed upon landed property being apportioned amongst the crown's vassals according to the old extent of their respective lands, it became necessary that their retours should set forth with precision the amount of that extent; yet this was not necessary in the retours relating to lands held of a subject, the vassals in these lands not being directly subjected in payment of any part of such taxations, but only liable to their own superiors in relief, and that too not in proportion to the true old extent, but according to the benefit they reaped from their feus, or to the agreement they had made with their superiors at receiving them: That, on this account, juries were under no necessity of inquiring minutely into the real old extent, except when the lands held of the King, or of the Prince; and that it accordingly appeared, that, in many charters granted by subject-superiors, the old extent had been screwed up as high as the feuduty, and the subsequent retours made to correspond with these charters. But to this it was held a sufficient answer, that the act of James III. 1474, cap. 55. appointed all retours upon brieves of inquest, without distinction, to contain the old and new extent; that they are all the verdict of a jury upon oath, and must be held as good evidence till falsified in course of law; and that, although the act of the 16th of George II. had rejected every other proof of the old extent, yet it admitted retours in general, without distinguishing whether, at the dates of such retours, the lands contained in them held of the King or of a subject superior \*.

Several questions have occurred with respect to the efficacy of retours of church-lands.

Irvine

\* July 26. 1753, Colonel Abercrombie *contra* Baird of Auchmedden. July 28. 1761, Stewart and others *contra* Dalrymple.



Irvine of Gribton claimed a vote upon the lands of Gribton, and, in evidence of their old extent, produced a retour dated in 1659, in favour of Mary Welsh, as nearest lawful heir to John Welsh, her brother; but these lands having belonged to the abbay of Holywood before the general annexation in 1587, it was objected, that no retour could entitle them to a freehold qualification, unless it were of a date prior to their having come into the hands of the church; for, although it was intended by the act 1594, that church-lands should be extended and taxed, in time to come, according to the old extent, yet they still continued to be assessed by Bagimont's roll as formerly: That, on this account, the act 1661, cap. 35. allowed proprietors of church-lands to vote, not in virtue of the old extent, but only when they were possessed of ten chalders of victual, or L. 1000 Scots of yearly rent, and that retours of church-lands had at no time been regarded, the extents found by such retours being considered as made at random. The court of session repelled the objection; and the ground upon which their judgment proceeded is thus stated by the reporter of the case: 'What they proceeded on was, not that the  
' act of parliament on which the complaint is founded (16th Geo. II.)  
' gives any greater effect to retours of date prior to 1681, than such  
' early retours had before, but that they thought this retour would  
' have been good even before the year 1681; and in this they did  
' not so much consider the possibility that it may have been a retour  
' in consequence of the act 1594; for it was agreed that that act had  
' never taken any effect; but they considered that the lands may  
' have been retoured before they came into the hands of the church.  
' In Irving of Wyfby's case, the feu-duty and the retour-duty was  
' the same: Therefore, the Lords considered the extent in that case  
' to have been no other than a random answer to the head of the  
' brieve, though, even in that, the court was not unanimous; whereas  
' here, not only was the feu-duty and retour-duty clearly different, but  
' there was a distinct retour of the old and the new extent; and all the  
' question



\* question was, Whether, in no case, a retour of church-lands could be sufficient? which was thought too strong a position to affirm\*.

The next case to be mentioned happened some years after. We have already seen that the Lordship of Culrofs, which had formerly been an abbay, was retoured in 1598, in consequence of the act 1594, cap. 233. At the Michaelmas meeting of the freeholders of Perth in 1760, four claims were offered for enrolment upon different parcels of that Lordship, and in evidence of the old extent of each of these parcels, the claimants appealed to the retour 1598. The freeholders admitted them to the roll; but it was objected, in a complaint to the court of session, that no retour was proper evidence of the old extent, but such as proceeded upon 'brieves for serving heirs, in which both the old and new extent are set forth; that there was no room for such brieves in church-lands, nor was it necessary for them to be extended, as they paid their proportion of the taxes by a different rule; that, although the act 1594 appointed all feu lands annexed to the crown to be retoured to merk and penny lands, it did not declare these merks or pennies to be the old extent; that, as that extent was at least of as ancient a date as the reign of Alexander III. a retour in 1598, which was the first that put any valuation on these church-lands, could not shew what was their true extent and worth two or three centuries preceding that period; and, although it bore to have been made *secundum antiquum extentum*, it was only thereby meant, that the lands had been valued in proportion to the old extent of other lands of the same kind or quality, in the manner the lands of the King's property were directed to be extended by the act 1597, cap. 281; that the act 1661 allowed no votes upon any church-lands but such as yielded ten chalders of victual,

or

\* February 10. 1747, Sir Thomas Kirkpatrick and others *contra* Irvine of Gribton; Kilkerran, *voce* retour.



or L. 1000 of rent, after deducting the feu-duties payable to the crown; that the act 1681, in like manner, allowed no person to vote upon church-lands in respect of the old extent, but only in respect of the valued rent, and that the act of the 16th of George II. by admitting no evidence of old extent but retours, meant to refer to verdicts upon brieves for serving heirs, but not to such a retour as that appealed to by the claimants, which was made in consequence of a commission under the great seal.

To these objections it was answered, that neither the statute 1681, nor the act of the 16th of George II. required that the old extent should be proved by a retour upon a brieve for serving heirs, and that any retour was sufficient for that purpose, provided it was prior to the 16th of September 1681; that, although it was not necessary to retour church-lands before their annexation to the crown; yet, as it was then resolved that all the lands throughout the kingdom should be taxed in one and the same manner, directions were accordingly given by the acts 1594 and 1597, for retouring all the annexed lands, and it was in consequence of these acts the commission issued, in virtue of which the retour in question was made; that, as the purpose of retouring these lands was to ascertain the old extent, so there could be no difficulty in fixing it; that many temporal lands had been acquired by the church after the days of Alexander III. when the old extent was struck \*, and when no certain evidence of it remained, the jurors were authorised by the act 1597, 'to retour the lands to the same avail, quantity, and proportion, as any other lands lying next adjacent to the same, holding of his Majesty, were retoured to;' that this was the rule in chancery by

Z. which

\* In this debate, the counsel for both parties seem to have taken it for granted, that what we now understand by the *old extent* was a valuation made up in the reign of Alexander III.; but this is highly improbable, as shall be shewn in a subsequent note.



which inquests are directed to extend lands, when no ancient record appears of the old extent; that it had been the practice of the freeholders in the several counties to receive such retours as the one in question; and that the old extent of most of the lands in Mid-Lothian was only vouched by a similar retour, dated in March 1554, and made for the very purpose of ascertaining it \*.

The court repelled the objection to the retour, and dismissed the complaint †.

Another question occurred in the very same year from the county of Wigton. A retour in 1625 being appealed to as evidence of the old extent, it was objected, that the lands to which it related were church-lands, formerly part of the See of Galloway, and therefore could have no proper old extent. The court accordingly found, that the retour produced did not afford sufficient evidence of the old extent of the lands ‡. But this judgment, which was carried by the smallest majority possible, was reversed in the House of Lords ||.

The eldest of several heirs-portioners enjoys some privileges over the others. Such dignities or honours as can pass to females descend to the eldest alone; and she and her heirs are likewise entitled by law to all other subjects, that, by their nature, do not admit of a division.

\* This is the retour referred to in the case of Tytler, taken notice of in a preceding note.

† Feb. 27. 1761, Moncrieff *contra* Erskine of Balgonie and others.

‡ July 28. 1761, Stewart and others *contra* Dalrymple.

|| April 1. 1762.

In another case prior to either of these, it was found that lands which had been mortified to the college of Aberdeen, with the common *reddendo* of *preces et lachrymæ*, and were afterwards sold by the college, afforded a freehold qualification to the purchaser. March 4. 1755, Dalrymple and others *contra* Sir James Reid of Barra.



division. How will this affect a freehold qualification, supposing the son of an elder sister, and two younger sisters, to succeed to a forty shilling land of old extent? The case occurred in the shire of Berwick in 1747: Moffat of East Moriestoun died without issue, leaving three sisters to take up his succession: The eldest dying, her son claimed to be enrolled; but, as he had only right to a third of the lands, and his aunts had right to the other two thirds, *pro indiviso*, it was found that he had no title to be admitted to the roll \*. The same rule holds when the qualification depends upon valued rent †.

The act 1681 requires that the old extent be distinct from the feu-duties in feu-lands. This needs an explanation. Feus were called improper fees, and were considered by feudalists in the light of locations. The annual feu-duty was reckoned to be the yearly worth of the lands; and the custom was, as it is still, to retour the lands to be worth the feu-duty, which is all that can be demanded by the crown as the non-entry duty: Of course, there could be no difference between the old and the new extent in lands held of the King in feu; and the retours of such lands do generally at this day bear, 'quod nunc valent feudi-firmam, et valuerunt tantum tempore pacis.' But as, by the acts 1594, cap. 233. and 1597, cap. 281. the annexed lands, and the King's property lands, were ordered to be retoured, and as, by the last of these acts, the stewarts and bailies were directed, in making such retours, 'to have ane special regard to the free rent, that the fewars and rentallers hes of the same lands, beside their few-fermes and dewties payed be them to our Soveraine Lord;' so, in consequence

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\* November 10. 1747, freeholders of the shire of Berwick *contra* Primrose. This decision, though perfectly well founded, shews how difficult it is, at times, to reconcile law with common sense. Had this estate been only a bare superiority, it would have gone to the eldest sister alone as an indivisible subject, and her son would have had a good title to a vote. Here then is an instance of a person's being in a worse situation, in a political view, by having the property as well as the superiority of lands.

† See March 6. 1760, Sir Michael Stewart *contra* Captain Pollock.



quence of the directions of these statutes, many public retours were made, and transmitted to chancery: Now, as the old law required that one should be possessed of a forty shilling land, or, in other words, should be liable in payment of taxes in proportion to a land of that extent, in order to entitle him to vote for a commissioner to parliament, so it was reasonable that those who held their lands of the crown in feu should prove that their free rent, after payment of their feu-duties to the King, was of that extent, these feu-duties being no part of their estate, but, on the contrary, a burden upon it, for which it was not intended they should pay any of the land-tax. Hence it was that the act 1681 required, that, in feu-lands, the extent should be distinct from the feu-duties. When that is the case, the lands are entitled to a vote, but, where the extent, old and new, is made the same with these feu-duties, they have no such privilege, how high soever it may be \*.

Having

\* January 19. 1745, freeholders of Lanarkshire *contra* Hamilton of Wishaw. June 14. 1746, freeholders of Perthshire *contra* Cleland. June 24. 1747, freeholders of Perthshire *contra* M'Ara. In this last case, M'Ara, in support of his claim to be enrolled, appealed to a retour of the fourth part of the lands of Drimnin, bearing them to be of value 'per annum, summam quinquaginta trium solidorum et octo denariorum monetae Scotiae, et tempore pacis tantum,' and to be held feu 'pro solutione quinquaginta trium solidorum et octo denariorum monetae Scotiae cum parte martis et divoriis debit. et consuet. una cum duobus solidis monetae antedict. in novam augmentationem rentalis dict. terrarum,' and insisted that the feu-duty was distinct from the old extent, and therefore the objection founded upon the act 1681 did not apply. The court, however, sustained the objection; and Kilkerran, in reporting the case, makes the following observation: 'This clause in the act of parliament has ever been thought dark; but the meaning of it was, by some of the Lords, thought to be, not that the feu-duty and the retour duty should be different sums, as there was nothing to hinder the feu-duty and old retour duty to coincide in the sum, but this, that, beside the *reddendo* of the feu-duty, there should be a separate retour of the old extent, and that, wherever there was such separate retour, it was a good retour, notwithstanding the feu-duty and retoured duty were the same. But the court was, as has been said, of a different opinion;' page 497.



Having now exhausted what seems necessary to be observed with regard to the old extent, the next thing to be considered, is the other branch of the first qualification, depending upon the lands being liable in public burdens for his Majesty's supplies for L. 400 of valued rent.

The old extent continued long to be the rule for proportioning the land-tax amongst the temporal lands of the kingdom of Scotland \*. The tax imposed in 1633 was regulated by it; but, during the

\* This seems to be universally agreed upon; but still a darkness attends the subject, notwithstanding all that has been written upon it. That the land-tax was levied from the temporal lands according to an old extent, and that so much was laid upon every pound land, is certain; but that one particular valuation was always understood by the words *old extent*, or was constantly observed as the rule for levying taxations upon land, is by no means so clear. On the contrary, every general valuation which we can now trace, either from the statute-book, or from other records, appears to have been taken at a time when some public tax was to be imposed; and, although authors differ as to the period at which the first general revaluation after the time of Alexander III. took place, they all fix upon some particular aera at which the exigencies of the state must have required a considerable sum to be raised. The author of the *Historical Law Tracts* is of opinion that no such revaluation was made till the reign of James I.; but Mr Erskine having discovered retours prior to that time, in which the new extent is higher than the old, does with reason conclude, that a revaluation must have taken place sooner, and pitches upon the year 1365, or 1366, as the period of such revaluation, because it must then have been necessary to raise money for the ransom of David II. How, then, can it be said that the tax imposed upon either of these occasions was levied according to the extent in the time of Alexander III. or that what we now call the old extent, in opposition to the new extent, was the valuation that was taken, or subsisted at that period? In matters of uncertainty, there is room only for conjecture. Perhaps the old extent mentioned in the retours after the act of James III. 1474, cap. 56. was the valuation which was made in the time of James I. (there being no evidence of any general valuation between these two periods) and the rule by which the taxes laid upon the temporal lands of the kingdom were afterwards levied. It must, at the same time, be confessed, that, from the above mentioned warrant by Queen Mary



the troubles in the latter part of the reign of Charles I. a new and different mode was introduced for levying the large sums that were imposed upon the owners of land. Monthly assessments were laid on; and, in order to render the burden equal, new valuations were made by commissioners appointed for that end, who were ordered to inquire into the just and true worth of every person's rent 'to landward, as well of lands and teinds as of any other thing where-  
' by yearly profit and commoditie ariseth \*.' By two acts of Oliver Cromwell's parliament, held at Westminster in 1656 †, certain quotas of the general assessment were laid upon each particular shire, and these quotas were left to be proportioned by the commissioners amongst the several landholders, according to the rates at which their respective lands were valued. Upon the restoration, the ancient mode of levying the land-tax by the rule of the old extent was revived ‡; but, when the next taxation was imposed in 1667, the new method was again adopted; a certain sum was laid upon each county nearly in the same proportion with that which had been fixed at Westminster in 1656, and the commissioners appointed for levying

to the sheriff of Aberdeen, in 1548, it should appear that it was then in view to follow a different rule from that of any former extent, for levying the tax intended to be laid on at that time; for, after mentioning that a general tax of men and money would be necessary, and that such tax could not be made till the value and extent of all the lands within the realm were known, it directs the sheriff to convene an assize (jury) to retourn all the lands within the shire in manner following, viz. 'the lands that give presently  
' of yearly mail and duty four pounds to twenty shillings of old extent, general and  
' universal, without any exception or regard to any retourn passit of before.'

\* See act of convention, August 15. 1643, and rescinded acts, August 1649, cap. 21. The proceedings of the commissioners appointed by this last act, in several shires, particularly the shire of Banff, still remain among the records in the lower parliament-house.

† Cap. 14. cap. 25.

‡ Act of the convention of estates 1665.



levying and collecting it were directed to proceed according to the former valuations, where they appeared equal and just, and to rectify them when they appeared to be erroneous, and also to make new valuations where estates had been dismembered, and conveyed in parcels to different persons \*. The rule laid down by this act has ever since been observed. Commissioners are always named for levying the land-tax, and these commissioners are empowered to do every thing necessary for adjusting the valuations of the several lands within their respective counties. It is the rent fixed by these valuations that is now called the valued rent, in opposition to the old and new extent; and it is incumbent upon every person who is not possessed of a retour prior to the 16th of September 1681, shewing that his lands are of forty shillings of old extent, to prove that they are rated at L. 400 Scots in the valuation books of the county, before he can claim to be enrolled as a freeholder †.

The eagerness for getting a seat in parliament, which has prevailed for a number of years past, has been productive of sundry abuses that could not be foreseen by the legislature. Those who are possessed of great estates, and want to split them into a number of freehold qualifications, to be bestowed on their friends and confidants, for the purpose of strengthening their political interest, must apply to the commissioners appointed by the land-tax acts, (commonly called

\* Act of Convention 1667.

† The original valuation rolls have been preserved in very few counties. The books according to which the land-tax is levied, and which have been made up from these original rolls, and are known by the name of the Cefs Books, do however supply their place. But these books do not shew how every particular subject was valued, as they generally throw the valuation of each land owner's whole estate into one heap, or *cumulo*, as it is called, without mentioning the particular valuation of the different baronies, or farms, of which it is composed.



led the Commissioners of Supply), for a division of their total, or *cumulo* valuations, unless they can shew that the several parcels into which they have so split their estates are forty shilling lands of old extent \*. Hence a door is opened for jobbing amongst these commissioners; and, if a majority of them be in an opposite interest, it sometimes happens that every obstacle is thrown in the way to prevent or retard the divisions of valuation which are sought by those who intend to claim to be enrolled as freeholders.

The commissioners of supply, in making such divisions, ought certainly to observe the plan mentioned in the note, by apportioning the total valued rent among the several parcels into which the estate is divided, according to their respective real rents. They may, however, at times be disposed to disregard that rule, and to lay more of the valuation upon some, and less upon others, of these parcels, than in justice ought to be allotted to them, for the purpose of frustrating the scheme in view, and of preventing the person who applies for the division from creating the same number of freehold qualifications upon his estate it was capable to produce upon a fair division of the valued rent. But in cases of this sort the law has provided a remedy. The proceedings of the commissioners are subject to the review of the court of session, as the supreme civil court of the nation;

\* The application is made by a petition, stating the amount of the total, or *cumulo* valuation, and praying for a division of it among the different lands to which it is applicable, in order that the particular valuation of each may be separately stated in the cefs books. The commissioners upon this allow a proof of the real rents of the several lands, and grant their warrant for summoning witnesses to appear at an after meeting, to which they adjourn. On that diet they proceed to take the proof, after which they generally remit it to their clerk to split the valuation accordingly, and, approving of his report, they set forth in their decree the separate value of each parcel, and order the same to be stated in the cefs books, and the cefs, *i. e.* land-tax, to be levied accordingly in time to come. Sometimes the commissioners appoint a committee of their own number to take the proof, and to give in a report to a subsequent meeting.



tion; and, in a process of reduction, that court does not only judge of the justice or injustice of such proceedings, but even sets the decrees of the commissioners aside upon nullities in point of form \*. They even frequently judge of such decrees, when quarrelled, by way of exception, in the course of complaints relating to the qualifications of freeholders. But, if a division be made by a general meeting of the commissioners, and appear, *ex facie*, to be regular, it can only be set aside in a formal process of reduction †.

It has been a subject of debate at whose suit such process of reduction can be competently brought. That every person immediately interested in a division, or who may himself be affected by it, either as being subjected to a greater proportion of the land-tax than he thinks he ought to pay, or as being reduced to a lower valuation than he wishes his land to be possessed of, may insist to have it set aside, is perfectly clear. It has, however, been doubted whether an action of this sort be competent to a freeholder who has no interest in challenging a division but to support objections to the enrollment of others. But when that point came to be warmly debated, and deliberately considered, in a question from the county of Inverness, the court of session sustained the title, and repelled the objection ‡. A similar judgment was pronounced in a question between the Duke of Gordon and Earl Fife §. It is true, that, in that case, one of

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\* February 12. 1751, Sir John Gordon *contra* Gordon of Embo. February 21. 1753, Colonel Abercrombie *contra* Leslie. August 7. 1753, Innes *contra* Sutherland. January 9. 1754, Cuninghame *contra* Stirling. March 10. 1774, Rofs and others *contra* Sir Roderick M'Kenzie.

† February 18. 1755, Forrester *contra* Preston. January 31. 1772, Major General Grant *contra* Robert Duff of Logie, and others, affirmed in the House of Lords, May 1772.

‡ March 10. 1774, General Rofs and others *contra* Sir Roderick M'Kenzie and others.

§ June 16. 1774.



the pursuers had an undoubted right to challenge the division, being himself immediately affected by it. But the court sustained the title of the pursuers in general, although the rest had no such interest.

Instances have occurred of the commissioners of supply refusing to divide valuations. Some of these shall be mentioned. The first happened in the year 1757, in the stewartry of Kirkcudbright. A small estate, consisting of many parcels of houses, acres, &c. being split amongst a number of purchasers, they, in a body, petitioned the commissioners of supply to divide the total valuation, for the purpose of ascertaining what proportion of the land-tax each of them ought to pay. The commissioners, unwilling to split the land-tax payable for the whole into so many fractions, refused the petition; but, the matter being brought before the court of session, the convener was appointed to call a general meeting in order to divide the valuation amongst these several purchasers †.

Another instance occurred nine years after in the shire of Angus. The late Earl Panmure, by twenty-two several dispositions, or feu-rights, conveyed as many parcels of his estate to his brother Mr Baron Maule, for the yearly payment of a trifling feu-duty for each parcel; and having thus divested himself of the property, obtained a new charter from the crown, upon his own resignation, in favour of himself, his heirs, and assignees; after which he granted conveyances to twenty-two different persons in liferent, and to himself in fee, of the several lands formerly feued out to his brother. These liferenters, after being infeft upon the precept in the Earl's charter, applied to the commissioners of supply to divide the Earl's *cumulo* valuation amongst them, in proportion to the  
real

† August 4. 1757, Malcolm, and others, *contra* commissioners of supply for the stewartry of Kirkcudbright.



real rent of the lands severally conveyed to them. The commissioners refused their petitions, upon the pretence that a division into so many parts would occasion great and unnecessary trouble, and render the payment of the land-tax more difficult and precarious, and that they were not bound to give encouragement to proceedings that were evidently carried on with no other view than to create a number of nominal and fictitious votes, contrary to the principles of the constitution, and to the express enactment of many salutary laws. The petitioners, upon this, applied to the court of session by bills of advocacy, and obtained an order in the following words: 'The Lords refuse to advocate, but remit to the commissioners of supply to ascertain the value of the complainers lands by disjoining the same in the cess-books from the *cumulo* valuation of the estate with which they stand presently valued, and appoint the convenor of the commissioners to call a meeting as soon as convenient for that purpose\*.' And the commissioners having afterwards thrown fresh obstacles in the way, the court, upon a new application, pronounced another order in the following words: 'The Lords having heard this petition, they appoint the commissioners of supply for the shire of Forfar, or any five of their number, to meet at the town of Forfar, in the place where their meetings are commonly held, upon Thursday the 12th instant, by ten o'clock forenoon, and not sooner, and to proceed directly to expedite the division of the valuation of the several lands wherein the petitioners stand inest; and, in order that the same may not be disappointed or postponed improperly, appoint the said commissioners, or their quorum aforesaid, at their said meeting, to take proof of the real rents of the several lands which the petitioners shall insist

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\* November 15. 1766, Earl Panmure, and others, *contra* the commissioners of supply for the county of Forfar. This judgment was affirmed in the House of Lords, February 10. 1767, with L. 200 costs.



‘are necessary to be proven, by examining such witnesses as the petitioners shall, upon that occasion, adduce before them, who, if any objection is made, are notwithstanding to be examined, reserving the consideration of the objections till the division comes to be judged of. And after the proof is taken, appoint them immediately to proceed to determine upon the import of it, and make the division accordingly; and if the commissioners shall find it necessary to adjourn their meeting, by reason that a quorum of five of their number cannot be got to continue together till the affair is concluded, the Lords, in that case, allow, authorise, and appoint the adjournment to be made to the first day thereafter, that any five of the commissioners shall declare their willingness to attend, who, in that case, are appointed to meet at the same place and hour, and to proceed in the said matter with despatch: And, if any further adjournment or adjournments are found necessary for the want of a quorum willing to sit longer, appoint the other adjournments to be made according to the rule above directed, and discharge (*i. e.* prohibit) every other business to be taken up by the commissioners at the said meetings until the division of the petitioners valuations is concluded; and declare, that no adjournment made by the majority of any meeting shall hinder any five of the commissioners to proceed, who are willing; and, in the last place, appoint the clerk by himself, or a depute for whom he shall be answerable, to attend the meetings regularly, while a quorum of five commissioners continue together on the said affair.’

A similar order was given upon the 18th of December 1772, relative to a division of the Duke of Gordon's valued rent in the county of Banff. The commissioners accordingly met upon the appointed day; but the majority, after stating certain objections, stopped further procedure. The minority, however, went on, and made a division; and the court of session justified their conduct, by finding that



that they were authorised to proceed, in respect that the majority did not do so \*. But, if the majority had proceeded to make a division, that division, however erroneous, must have been the rule, till rectified.

Another case of a like nature occurred at the time of the general election in 1780. It was, however, attended with a peculiarity that gave rise to a warm contest. William Brown having acquired certain lands in the county of Ayr, neglected to get their separate valuation ascertained, till within twelve days of the election for that county, which was held upon the 16th of October 1780. Upon the 4th of that month, he applied to the convener to call a meeting of the commissioners of supply for that purpose, and insisted that it should be held upon Friday the 7th. The convener, who was in a different interest, answered, 'That he was very willing to call a meeting of the commissioners as required; but that it was impossible for him to call it so soon as Friday first, as he had never been in use of calling any meeting without previously advertising it in the Glasgow papers; and as he could not have an opportunity of advertising a meeting sooner than in the Glasgow papers of the 13th October instant, he should take care to have it advertised that day, to be held at Ayr on Wednesday the 18th instant.' Mr Brown, and some others in like circumstances, complained to the court of session by bill of advocation; and, on the 7th of the month, the judge officiating on the bills pronounced the following deliverance: 'Having considered the within bill, petitions, and protest in name of the complainers, and answer by the convener of the commissioners of the land-tax for the shire of Ayr, refusing to call a meeting of the said commissioners, as required so to do; in respect there is not time for appointing this bill to be seen and answered.'

\* June 21. 1774, Stephen *contra* Abercrombie.



‘swered in common form, refuses to advocate. But appoints the  
‘commissioners of supply of the shire of Ayr, or any five of their  
‘number, to meet at the town of Ayr, in the place where the meet-  
‘ings are commonly held, on Thursday the 12th of October cur-  
‘rent, at ten o’clock forenoon, and not sooner, and to proceed di-  
‘rectly to expedite the division, ascertainment, or approbation of  
‘the valuation of the several lands wherein the complainers stand  
‘infest; and, in order that the same may not be disappointed, or  
‘postoned improperly, appoints, &c.’ as in the order respecting the  
cases from the county of Forfar. Of this deliverance no intimation  
was made, either to the commissioners at large, or to their conve-  
ner, nor was there any notice given of it, even to the clerk, till the  
very hour of the meeting, when a few of the commissioners, in the  
same interest with Mr Brown, went into the court-room, and in a  
short time ascertained his valuation to be L. 471 : 5 : 2 Scots, and  
ordered it to be so entered in their books. At the meeting held for  
the election, upon the 16th of the month, Mr Brown claimed to be  
enrolled; and, in proof of his being possessed of the valuation re-  
quired by law, produced this recent decree. The majority of the  
freeholders, however, refused to enroll him; and, upon his enter-  
ing a complaint to the court of session, their judgment was endea-  
voured to be supported chiefly upon the following grounds: ‘That,  
‘although the court of session might review the proceedings of the  
‘commissioners of the land-tax, yet here there were no proceedings  
‘to be reviewed, the matter that gave rise to the bill of advoca-  
‘tion being the exercise of an office, not the sentence of a judge;  
‘and that, even when there was room for an advocacy, still an in-  
‘timation to the commissioners was necessary, so as that all of them  
‘might have an opportunity to attend. In the case of Malcolm, and  
‘others, against the commissioners of supply of Kirkcudbright, the  
‘convener was appointed to call a general meeting. And in the  
‘cases from the counties of Forfar and Banff, the collective body of  
‘the



‘the commissioners had been regularly brought into court, and ordered to meet; and, it was only upon their being refractory, that power was given to any five to proceed in the business; but here no intimation was made to the commissioners at large, to acquaint them of the time of the meeting, nor was any notice given, either to them or to their convener, of the application made to the court of session, upon which the order proceeded.’ This argument was also enforced by an observation to the following effect: ‘That, to give validity to such proceedings, were to open a door for the greatest injustice. A person who had a job to carry through at the eve of an election, of which he could not expect the approbation of the commissioners at large, would be under no difficulty of effecting his purpose, provided the convener was his friend; for, in that case, he needed only to get him to refuse to call a meeting, and then apply to the Lord Ordinary on the bills for authority to any five of the commissioners to proceed; as, in that event, he might keep the whole business a secret from every commissioner of the county, except those in whom he could confide, and who might be willing to concur in his scheme.’ This reasoning was, however, attended with no success. The objections made by the freeholders were over-ruled, and Mr Brown was ordered to be added to the roll\*. The reporter of this case observes, ‘That some of the Judges thought that an opposite party ought to have been in the field, in order to give validity to the judicial procedure; but, as it was not alledged that the commissioners had done any wrong, and as they had precisely followed the mode pointed out by the Lord Ordinary, the court repelled the objection.’

Many questions have occurred with regard to the validity of decrees of division of valuation. It will, therefore, be proper to consider

\* December 6. 1780, William Brown *contra* John Hamilton.



sider in what manner the commissioners ought to proceed, so as to act regularly in matters of that kind.

The annual acts, imposing the land-tax, name a number of commissioners for each county; but, as it is impossible for the legislature to know whether or not all the persons suggested to them are possessed of property, or have an interest in the county sufficient for presuming them worthy of that trust, a *proviso* is constantly thrown in, that none of the persons so named shall be capable to act without being infeft in superiority or property, or possessed, as proprietor or liferenter, of lands, valued in the tax roll of the county where he acts, to the extent of L. 100 Scots *per annum*, except the eldest sons and heirs apparent of persons who are so infeft of lands to that extent and valuation, and provosts, bailies, deans of guild, treasurers, masters of merchant companies, or deacons conveners of the trades for the time being, of any royal borough, and bailies for the time being of any borough of regality, or barony; and that any who being so disqualified, shall take upon them to act, shall forfeit L. 20 Sterling for every such acting, to be recovered by action, complaint, or petition, in a summary way, at the suit of any heritor within the county, before the county court, or the court of session\*.

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\* In interpreting this statute, the court of session seems now to think it sufficient to inflict one penalty for one meeting, even though adjourned from one day to another, and though the person complained of may have acted in many different points. So they decided July 25. 1775, M<sup>r</sup> Adam, and others, *contra* Logan. They also refused to give costs in that case. A different judgment, in both these respects, was given in some former cases. 1766, Sir John Gordon *contra* Forbes. *Idem contra* Forsyth.

In a question from the county of Cromarty, two different persons were found qualified to act in virtue of the same lands, although neither of them was the immediate vassal of the crown. The case stood thus; Anderson of Udal was base infeft upon a disposition



The commissioners are ordered to meet at the head boroughs of their several shires, on a certain day named in each act, and are impowered to appoint the subsequent diets of their meetings, and to name their conveners from time to time. This is wisely ordered to prevent packed meetings of a few commissioners for the purpose of serving a job; and it has accordingly been found by the court of session, that a valuation cannot be divided except upon the day of their first meeting named in the act, or at a meeting by adjournment, or a general meeting properly summoned by the convener\*. But if a division made by a private meeting be confirmed or homologated by a subsequent legal meeting of the commissioners, it will be thereby validated†.

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disposition from Mr Hugh Anderson, who held of the proprietor of the Estate of Cromarty and this sub-vassal, having conveyed the lands to Henry Davidson, who infest himself base upon the precept in that conveyance, both were found qualified to act; January 21. 1766, Sir John Gordon *contra* Anderson. If this decision be well founded, it is hard to say where to stop. It should seem, that as many may act in respect of one parcel of land of L. 100 valuation as there may be sub-feus of it granted.

\* February 21. 1753, Abercrombie *contra* Leslie. January 9. 1754, Cunningham *contra* Stirling. Where there is no convener, any individual commissioner may call a meeting; December 24. 1767, William Pulteney, and others, *contra* Sir John Gordon, and others.

† March 6. 1754, Campbell *contra* Stirling. June 16. 1774, Earl Fife, and others, *contra* the Duke of Gordon, and others. We may, however, observe in the decisions of the court of session on this point, distinctions that appear rather nice. The estate of Newliston, in the county of West Lothian, stood valued at L. 1600, and, in 1740, a committee of the commissioners of supply disjoined from it the lands of Gatefide. These they valued at L. 130, and a note relative to this procedure was entered in the books kept by the collector of the land-tax. The proprietor of Gatefide was also enrolled as a freeholder upon the footing of these lands being of that valuation, and stood upon the roll during life. In 1765, Mr Hogg, then proprietor of Newliston, applied for a division of the *cumulo* of L. 1600, and the commissioners, in respect of the disjunction made in 1740, refused to take any proof with regard to Gatefide, but divided the remainder. In consequence of this division, sundry persons were enrolled; but, in a complaint brought by Mr Hope-Weir, the



The acts imposing the land-tax are very inaccurate in one respect, namely, as to the number of commissioners that must be present in order to constitute a quorum; but in practice the commissioners act at their meetings as if they were not confined to any quorum. See upon this point Statute Law Abridged, p. 429. In the cases from the counties of Forfar, Banff, and Ayr, above mentioned, where the court of session ordered any five of the commissioners to proceed in the divisions, the judges shewed that they did not consider any greater number to be necessary to make up a quorum.

In 1756, a question occurred, whether the convener could call an immediate general meeting, notwithstanding an adjournment made by the commissioners to a more distant day. The court of session found that he might do so, upon the application of any person having interest\*.

In 1768, another difficulty occurred. The commissioners of supply of the county of Linlithgow had neglected to name a convener;

the court of session, March 1768, found the proceedings in 1765 not sufficient to homologate or ratify the former procedure in 1740, which was only held by a committee; and therefore ordered the persons complained of to be expunged from the roll. In a subsequent case, however, a division made by a committee in 1752, which had been entered in the books of supply, and upon the footing whereof, though never formally approved, two subdivisions had been made in 1770 and 1772, was sustained; July 20. 1773, Brodie *contra* Gordon of Wardhouse.

\* December 14. 1756, Sir Robert Gordon, and other petitioners. In this case the convener, when desired to call a meeting for the purpose of proceeding in a division, was doubtful of his powers. The parties interested in the division applied to the court of session by petition; and, as it appeared to the court, that the convener had himself no objection, but only wanted their authority for calling the meeting, the deliverance was given, without ordering the petition to be served either upon him or upon the commissioners.



er; but, upon a petition from Mr Hogg of Newliston, the court of session empowered the sheriff to call a meeting, on proper advertisement in the Edinburgh Newspapers; and authorised the commissioners, when they should meet, to choose a convener, and proceed to business. The sheriff obeyed, but appointed a day too distant to answer Mr Hogg's object; upon which the latter preferred a bill of advocacy, complaining of the sheriff's injustice in that respect; and it being then vacation time, the Lord Ordinary officiating on the bills shortened the time, and named an earlier day for the meeting of the commissioners.

The land-tax act, 1748, and other annual acts since that time, have provided, that the commissioners of supply shall, before acting in that character, take and subscribe the oaths of allegiance and abjuration, and subscribe the assurance appointed by law to be taken and subscribed by persons in offices of public trust in Scotland, under the pain of forfeiting the sum of L. 20 Sterling. That commissioners, who take it upon them to act as such, without complying with this proviso, are liable to the penalty, cannot be disputed; but, as the statutes do not declare the proceedings of such commissioners to be void and null, it came to be made a question, Whether a division of a valuation could be quarrelled upon that ground? and the court of session, in a reduction of a decree of division made by the commissioners for the shire of Caithness, found, 'that the commissioners not having taken the oaths of allegiance and abjuration, pursuant to the act of parliament 1749, were not capable to act in the execution of that statute; and therefore found the division void \*.'

B b 2

One

\* February 22. 1751, Sutherland of Swinzie *contra* Sutherland of Forfe, &c. Perhaps the recency of the rebellion 1745, and the zeal of the judges to curb Jacobitism, may have contributed somewhat to this judgment.



One should be apt to imagine, that, in order to render the procedure in the division of a valuation valid, all persons interested in the *cumulo*, or whose proportion of the land-tax may be affected by such division, ought either to concur in the application to the commissioners, or to be called as parties. It is, in fact, a regular process; and in all such it is a general rule, that, unless every person interested be in the field, no procedure can take place. This rule is, however, not pushed with rigour in divisions of this sort. It is not necessary to call the tenants in the lands, even although, by their leases, they are taken bound to pay either the whole, or a proportion of the land-tax. Their interest is but consequential and temporary. Neither is it necessary to make the superior a party, whatever influence the division may have upon his political views \*. Even where it is neglected to call those who are substantially interested in the division, and may on that account bring it under challenge, the court of session does not allow either a commissioner of supply, or a freeholder, to make that omission an objection, unless they can likewise show that the division is materially wrong. An interest is necessary as well as a title; but, unless the division be faulty, no person whatever has any interest to challenge it, or to insist that it shall be set aside †.

The

\* July 24. 1760, Earl of Home *contra* Broomfield.

† December 6. 1780, Sir Walter Montgomery-Cunningham *contra* Hamilton of Sundrum. In this case, the application for the division was made by Sir Walter Montgomery-Cunningham, who was only superior of a part of the lands to which the *cumulo* was applicable; and, in support of the objection, that the vassals by whom the land-tax was to be paid ought to have been brought into the field, the following among other arguments were urged: ‘ When a set of vassals jointly apply to the commissioners of supply to divide amongst them the *cumulo* valuation under which their several lands are included, they are under no necessity of making their superior a party to such application, as the total valuation of the whole of their lands must still remain the same; but,



The regular method of dividing *cumulo* valuations, is by proportioning them according to the real rents at the time of the division; but, when the land-tax has been paid by the vassals for a considerable time in certain proportions fixed by their feu-rights and dispositions, or other agreement, the commissioners may follow that rule, without inquiring nicely into the justness of such proportions. It is not to be presumed that any of the vassals will voluntarily agree to pay a greater share of the land-tax than truly corresponds to his real rent.

‘ but, when the application comes from the superior, there is an absolute necessity to  
‘ make all the vassals parties, because they have an evident interest in the apportioning  
‘ of the *cumulo* among themselves. A decree of division, without their being called,  
‘ must therefore be void and null to all intents and purposes, and cannot be produced  
‘ as evidence before a court of freeholders, or be offered to them as a proof of the se-  
‘ parate valuation of the respective lands belonging to the several vassals. It should  
‘ make no variation upon the argument, that none of Sir Walter Montgomery’s vassals  
‘ would be permitted to challenge the present decree of division without showing that  
‘ it was prejudicial to them, and was therefore liable to be taxed with injustice. These  
‘ vassals have good opportunity to know whether any of them has met with injustice or  
‘ not, and it were to no purpose to allow them to challenge the decree, unless they could  
‘ qualify injustice, as, otherwise, the challenge could be attended with no effect. But  
‘ the freeholders can neither be supposed to know, nor are bound to inquire into, the  
‘ justice or injustice of the decree: It must be sufficient for them that it is *ex facie* void,  
‘ in respect that all parties having interest were not called; and on that account it must  
‘ be entitled to no more regard from them than a sheet of white paper. A decree of  
‘ division made by one or two commissioners, without authority, may be as just and  
‘ impartial as a division made at a general meeting called in the most regular manner;  
‘ but how much soever the parties may be satisfied with its justice, or how clearly so-  
‘ ever its impartiality may be made to appear, the freeholders will not be bound to pay  
‘ the least regard to it, until it meet with the approbation of a general meeting. The  
‘ objection, that there is no process through want of parties, seems, however, to be  
‘ equally well founded with the objection that there is no regular court.’ The court of  
‘ session, however, repelled the objection. It is true, that, in this case, there was no process  
‘ of reduction; but that circumstance had no influence in the decision. It appeared *ex facie*  
‘ of the proceedings, that Sir Walter Montgomery was only superior, and that the vassals  
‘ had not been called. The objection, therefore, if good in the shape of a reduction, was  
‘ equally good by way of exception.



rent \*. But, if a person possessed of an estate of little more than L. 400 of valued rent, should sell the one half of it, and, with a view to retain a freehold qualification, become bound to take upon himself the payment of the whole land-tax, or of such a proportion of it as would correspond to L. 400 of valued rent, it might be argued, that a division proceeding upon the use of payment conformable to such agreement, ought not to be sustained to the effect of entitling the seller to claim a right to vote as a freeholder; because, although his lands did actually pay his Majesty's supplies for L. 400 of valued rent, yet they neither were liable, nor was there just ground to presume them liable, in payment of such supplies to that extent. But, where a person obtains a division of his *cumulo* valuation, in the view of parcelling it out in different freehold qualifications, trivial objections will not be listened to. He can never make more votes out of his estate than its total valuation will bear; and it is of little moment that one parcel may have got a greater, and another a smaller proportion, than they would have been entitled to, if the division had proceeded with all the accuracy possible. In the case of General Grant against Duff of Logie and others, the court of session reduced a decree of division of the valuation of the estate of Innes, because no proper evidence had been brought of the real rent of a part of that estate, the witnesses having only referred to an estimate said to have been made by sworn appraisers appointed by the sheriff of Murray, who, however, afterwards appeared not to have been put upon oath. But the House of Lords reversed this judgment †.

In

\* January 17. 1775, Galbraith *contra* Cunninghame. *Eodem die*, Campbell of Menzie *contra* freeholders of Stirlingshire.

† February 1773.



In dividing *cumulo* valuations according to the real rents, regard must be had to such subjects only, as by the acts of parliament, or convention, introducing this mode of apportioning the land-tax, are appointed to be valued. These, according to the act 1649, were 'money-rent, victual-rent, casualties paid by tenants, and casual-rent of coal, salt, and salmon fishings, and other fishings in property, whereby there is a yearly benefit;' but, by an unprinted act of the parliament 1681, which passed in consequence of several petitions complaining of great inequality in the valuations formerly made in several shires, it was particularly enacted, 'that coal and salt is not to bear any part of the supply \*.' Under the words *other fishings*, oyster fishings, and muscle fishings, of which the crown is in the practice of giving exclusive grants, are clearly comprehended; but what shall we say of white fishings in the sea? These can scarcely be called fishings in property, being common to all the nation; but yet, when they have been actually valued, they have been found to afford a title to a freehold qualification †.

It has been much questioned, Whether, in such divisions, any part of the *cumulo* ought to be allotted to mills. They are not mentioned in the act 1649; it was therefore a discretionary matter in the commissioners to value them or not. It accordingly appears that some were valued and others not. Of the first we have instances in the county of Banff, from the records of the commissioners  
preserved

\* A copy of this act is in the Appendix, No. 32.

† M'Leod of Cadboll *contra* Mr Robert Blair. August 7. 1773, Lord Adam Gordon *contra* Duff. In this last case it was affirmed, that there were sundry grants of white fishings by the crown through Scotland, and particularly in the shire of Banff; that these, when followed by possession, gave an exclusive property, and that, in divisions of *cumulo* valuations, it was usual to lay a part upon them. In the county of Banff there is also an instance of a ferry-boat being valued.



preserved in the lower Parliament House. When certain evidence can be brought of their having been once valued, they ought to receive a proportion of the *cumulo* to be divided; and, if it be uncertain whether they were originally valued or not, the distinction between those which have a regular thirlage, and others which are not entitled to any, but depend entirely upon voluntary employers, seems to be reasonable. The rent of the latter must be altogether precarious, and, in fact, is only the price of labour; but the rent of the former may be considered as permanent, and, on that account, they ought to receive a part of the *cumulo* valuation. So the court of session judged in the case of General Abercrombie *contra* Gordon of Thorniebank \*. And there seems to be no ground for distinguishing whether the thirlage belonging to a mill be of other mens lands, or of the lands belonging to the proprietor of the mill.

Objections have sometimes been made to decrees of division, on account of the commissioners having allotted no part of the *cumulo* valuation to feu-duties payable to the superior. If the *cumulo* comprehends lands that were feued out before the general valuation, a part ought regularly to be allotted to the feu-duties payable for such lands, and the remainder upon all the property lands. But no instance can be given of allotting any part of a *cumulo* to feu-duties, where the feus have been granted since the general valuation. The land-tax is constantly levied from the vassals, and, of course, it were improper to lay any part of the valued rent upon the feu-duties payable to the superior.

The commissioners of supply being the only persons intrusted with the adjustment of the valued rent, the freeholders cannot take any other evidence that the lands upon which a claim is entered for enrolment are of the valuation required by law, than what arises from

\* August 10. 1773.



from their books. It is not, however, necessary that the books themselves, or even extracts from them, be produced; a certificate under the hands of two commissioners, and of the clerk, of supply, is held to be sufficient evidence of the fact\*; that evidence may, however, be redargued by the books themselves; for, if not agreeable to them, the certificate is false.

It is worth while here to take notice of a case, where a division made by the commissioners of supply was sustained, although both evidently and grossly erroneous. The lands of Broadstone, in the county of Air, stood valued in *cumulo* at L. 680 : 2 : 2 Scots. Part of these lands belonged to the Earl of Eglinton, and part to Mr Shaw Stewart of Greenock. In 1760, an application was made to the commissioners of supply, on the part of Mr Shaw Stewart, for a division of this *cumulo*. The commissioners, in making the division, adopted as their rule the usage observed in paying the land-tax, but, by an accidental error in calculation, they, by their decree, allotted L. 21 : 16 : 4 of valuation to Mr Shaw Stewart's part of the lands, more than it was entitled to by that rule, and, consequently, gave so much less to the other parcel belonging to the Earl of Eglinton. From the date of this decree, the land-tax was paid for the respective parcels in proportion to the valuation it had allotted to each; and, in 1780, Mr Shaw Stewart was enrolled a freeholder upon his part of Broadstone, as valued at L. 362 : 6 : 4, and upon certain other lands valued at L. 55 : 19 : 4, making in all L. 415 : 5 : 8. Soon after this enrolment, the mistake committed by the commissioners at making the division was discovered, and made the foundation of a complaint against Mr Shaw Stewart's enrolment; but, as all the parties concerned had acquiesced in the decree, and the land-tax had been paid accordingly for twenty years, the court of session dismissed the complaint†.

C c

By

\* February 5. 1760, Campbell of Shawfield and Graham of Gartmore *contra* Muir of Caldwell.

† July 25. 1780, Charles Fergusson *contra* John Shaw Stewart.



By the act 1681, there was only place for the qualification of valued rent, in case the old extent did not appear; so that a person whose lands were actually retoured to a less extent than forty shillings could not be enrolled, how great soever his valued rent might be; but this was altered by the act of the 16th of George II. which expressly declares \*, 'that lands holden of the King or Prince, liable in public burdens for L. 400 Scots of valued rent, shall in all cases be a sufficient qualification, whatever be the old extent of the lands, any law or practice to the contrary notwithstanding.'

The statutes establishing the right of voting confine the qualification to lands. Hence it was found, that a charter of the offices of Coroner and Serjeant, though held of the crown by the tenure of ward and relief, and retoured prior to 1681, did not entitle one to be enrolled †. Fishings, if valued in the cefs-books, are, however, sustained, in order to make up the qualification of L. 400 Scots ‡. The teinds of a person's own lands, if separately valued, and purchased by him from the titular, may likewise be taken *in computo* for that end ||; but it is not necessary for one whose lands are valued in the books of supply at L. 400, to shew that he has an heritable right to the teinds of such lands §. It has not been determined whether one can be enrolled upon the teinds of another person's lands, though separately valued in the books of supply. The question

\* Sect. 9.

† January 14. 1761, Andrew Stewart *contra* freeholders of Lanerkshire.

‡ July 10. 1745, Freeholders of Aberdeenshire *contra* Fordyce. *Modem die*, Freeholders of Dumbartonshire *contra* Campbell. August 7. 1773, Lord Adam Gordon *contra* Duff.

|| January 29. 1745, Dunbar *contra* Sinclair.

§ March 3. 1753, Captain Scott, *contra* Captain Sutherland. February 1774, General Grant *contra* Duff of Logie.



question has never hitherto occurred; but, although the argument, in the case of Dunbar against Sinclair, proceeds upon the supposition that they could not afford a freehold qualification, it may surely be maintained, that teinds are as properly comprehended under the word *lands* as fishings, which are held to give a sufficient title. Indeed, in the language of the election law, *lands* and *estate* are synonymous.

We come now to the second qualification respecting the title, viz. that the lands on which the claim is founded must hold of the King or Prince. This may appear a hardship in the present state of Scotland. Many persons are possessed of large estates who are incapable to elect, or to be elected, commissioners to parliament; because they only hold them of subject superiors, while, on the other hand, many, by holding immediately of the crown, are entitled to that privilege, although their estates (consisting of a bare superiority) do not, perhaps, yield them a penny in the year. Whether this be worthy of the attention of parliament, must be left to those who have it in their power to interpose in such matters: It is sufficient here to observe, that the law, as it stands at present, is perfectly agreeable to the original constitution of parliament, which neither required nor admitted the attendance of sub-vassals, who were considered to be fully represented in the great council of the nation by their immediate over-lords or superiors. This, however, cannot with so much propriety be said to have been the case after the act of James VI. 1587, when the small barons came themselves to attend only by representatives. The vassals of the peers, or great barons, might still be said to be represented by their superiors, each of whom was entitled to a seat in parliament; but the case was otherwise with the vassals of small barons, of whom only two out of each county were admitted to that privilege.



When a superior refuses, or, by reason of his not having made up his own titles, is unable to enter his vassal, by granting a new investiture, the law of Scotland has established a process by which the vassal can obtain an entry from the crown, or other over-lord of his own immediate superior. In such case the crown, or other over-lord who grants the investiture, is said to act *supplendo vices* of the immediate superior; and it has been questioned, whether a sub-vassal, who in this manner obtains a charter from the crown, is entitled to be enrolled as a freeholder. Sir George Mackenzie, in his Observations on the act 1681, cap. 21. \*, tells us, that the committee for controverted elections made a report, which was approved in parliament, and, *inter alia*, contained the following resolution: If 'the King be only superior *supplendo vices* of the immediate superior, by his not entering to the superiority, this will not give the vassal a vote, since the immediate superior retains all the casualties, and, consequently, remains still superior, albeit, *pro hac vice*, the King supplies the defect of the immediate superior's lying out, by 'infesting the vassal.'

A case somewhat similar occurred lately. Alexander Brodie of Brodie, superior of the lands of Wester Brims, belonging in property to the Earl of Caithness, died in 1759, and his estate being much incumbered, his heir declined to make up titles till the year 1773, when a crown charter was obtained by James Brodie of Brodie, who conveyed the superiority of these lands to Earl Fife, by whom it was again transferred to Sir James Duff in liferent, and to the Earl himself in fee. In the mean time, Sir John Sinclair of Murkle, to whom the property of these lands devolved upon the death of the Earl of Caithness, had obtained a decree of declarator of tinsel of superiority † against the

\* Page 467.

† A decree of the court of session, declaring that they had, during their lives, lost the right of superiority over their vassal.



the heirs of Alexander Brodie, and had, in consequence of that decree, procured a charter from the crown, *supplendo vices* of the immediate superior; and Earl Fife, and Sir James Duff, having claimed to be enrolled on these lands at the Michaelmas meeting of the county of Caithness in 1779, Sir John Sinclair objected, that he was the immediate vassal of the crown, and that the heirs of Alexander Brodie had lost the superiority during their lives, by virtue of the act of parliament 1474, cap. 57. and in consequence of the decree of declarator which he had obtained against him. The freeholders sustained this objection; but the claimants having preferred a complaint to the court of session, in which they quoted a variety of authorities to prove that a superior, by lying out unentered, and by the vassal's obtaining a charter from the crown *supplendo vices*, did not lose his character of superior, or his right to the feu-duties, or other casualties, but only the non-entry duties during his own life, the court found, that the freeholders did wrong in rejecting the claimants, and ordered them to be added to the roll \*.

A person having claimed to be enrolled, partly upon his right to the superiority of certain lands, and partly upon a right to feu-duties, payable out of other lands, which had originally belonged to an abbay, and, after the Reformation, had been erected into a temporal lordship, it was objected, That the vassals in these lands had taken the benefit of the acts of annexation, and held them immediately of the crown, and, therefore, were not vassals to the claimant, who by his charter had no other right than that of uplifting the feu-duties; and it was accordingly found that he had no title to be enrolled †.

A.

\* 1780, Earl Fife and Sir James Duff *contra* Sir John Sinclair.

† January 17. 1755, Campbell of Monzie *contra* Campbell of Ardkinglass.



A case of a similar nature occurred from the county of Ayr at the general election in 1780. Mungo Campbell had been enrolled a freeholder of that county at Michaelmas 1779, upon certain lands conveyed to him by the Earl of Eglinton, and, amongst others, the lands of Monkcastle, which had formerly belonged to the abbay of Kilwinning, erected into a temporal lordship in favour of the family of Eglinton. No complaint was made of this enrolment; but, at the Michaelmas meeting 1780, John Boyes claimed to be enrolled, partly upon these lands of Monkcastle, to which he derived right from the Duke of Hamilton, whose family were the church vassals, and had them contained in their charters from the crown for more than a century. The freeholders rejected Mr Boyes's claim, in respect that Mr Campbell stood already enrolled on these lands, and no alteration in his circumstances had taken place. Mr Boyes renewed his claim at the meeting for election held upon the 16th of October 1780, and insisted that the former objection ought to have no influence, because Mr Campbell had at that meeting refused to take the oath of possession, and, therefore, should have been struck off the roll, although the majority of the freeholders had wrongfully refused to do so. But Mr Boyes's claim was again rejected; upon which he complained to the court of session, who pronounced the following judgment: 'Find that the freeholders of the county of Ayr convened at their last Michaelmas head court, held at Ayr upon the 3d day of October last, did wrong in refusing to admit the complainer on the roll of freeholders for said county, and that the complainer ought to have stood on the said roll of freeholders at the subsequent election on the 16th day of the said month; find that the freeholders at said election meeting also did wrong in refusing to admit the complainer on the said election roll \*,' &c. Before this interlocutor was pronounced, Mungo Campbell had been ordered

\* December 21. 1780, John Boyes *contra* Hamilton of Sundrum.



ordered to be struck off the roll on account of his having refused to take the oath of possession at the meeting for election; but, as the court found that Mr Boyes ought to have been enrolled at the Michaelmas meeting, it thence appears to have been their opinion that Mr Campbell had been erroneously admitted to the roll upon these lands of Monkcastle, and that his being so admitted was no bar to the claim of Mr Boyes, who was the proper crown vassal, although the Earl of Eglinton, the Lord of erection, and Mr Campbell as his assignee, had right to the feu-duties. It would, indeed, be an evident hardship, if one who had an unexceptionable title to get upon the roll was to be kept off, merely because another had been improperly admitted in virtue of the same lands, or had not been timely objected to after being divested of them. A case of the last sort occurred a few years ago. Laurence Craigie, one of the freeholders of the county of Kinross, conveyed the estate upon which he stood on the roll, to Colonel Skene; and, two months before Michaelmas 1775, the Colonel lodged, with the sheriff-clerk, a claim for being then enrolled. No objection was, however, lodged against Mr Craigie's right to continue upon the roll. On that account, the freeholders could not legally strike him off, and they made that a pretence for refusing to enroll Colonel Skene. But the court of session reversed their judgment, and ordered him to be added to the roll. They were of opinion, that, by lodging his claim in due time, and by producing a sufficient title to a freehold qualification, he had done all that the law required of him, and that he was not further bound to lodge an objection against Mr Craigie, from whom he had acquired that qualification \*. The question might have been avoided by Colonel Skene's producing a consent by Mr Craigie to his being struck off the roll.

Royal

\* December 15. 1775, Colonel Skene *contra*.



Royal boroughs, boroughs of regality or barony, hospitals, and other corporations, may be infeft in, and possessed of lands holding of the King; they, cannot however, vote in the election of commissioners from shires in virtue of such lands, how high soever their extent or valuation may be. The whole strain of the statutes concerning such elections, which talk always of *freeholders* or of *persons*, seems to exclude all bodies politic or corporate. No freeholder can be admitted to act by proxy or delegation; but, without such a power, a body corporate cannot possibly vote. Besides, the oaths which the law allows to be put to freeholders cannot be taken by delegates from such bodies. There is, therefore, no room for admitting them to a vote, and so the court of session found after a most deliberate consideration \*.

It

\* March 6. 1760, Sir Michael Stewart *contra* borough of Paisley. This borough had long been in the practice of voting by a delegate; and, it even appeared, that its vote had been sustained in the Scottish parliament 1703, on occasion of a controverted election for the shire of Renfrew. The minute of parliament runs thus: ‘*Item*, the objection against the town of Paisley (that being a borough of barony, howbeit infeft and in possession of a freehold; yet, since no burghers could be a delegate for that end, therefore, the incorporation could have no vote in the election of barons), was considered, and the house having acquiesced to sustain the vote, the objection was passed from, by the party, and allowed to be withdrawn.’ Of late, this borough has been in the custom of conveying its superiorities in liferent to a particular person, for a price paid by him, and in that way an unexceptionable vote is created. The paying a price is of no other consequence than to guard against a challenge of the transaction on account of a dilapidation of the common good of the borough. It is nothing to the freeholders whether a price be paid or not.

Upon the 6th of August 1681, it was also resolved in parliament ‘That a master of a hospital having lands mortified thereto, holden of the King, being a forty shilling land, or ten chalder of victual being kirk-land, holden of the King, wherein the master is infeft, may have a vote in the election of a commissioner to parliament.’ Fountainhall makes the following remark upon this and another judgment of that parliament: ‘In the act made for regulating elections in shires, there were two points which  
‘ had



It has become a pretty common practice for the royal boroughs to alien parts of their burgage lands, to be held feu of themselves. But, even although after doing so, they were, by connivance, to convey the superiority to a purchaser, so as to make way for his obtaining a charter from the crown, that would not confer upon him a right to vote, or entitle him to be enrolled as a freeholder. The lands still remain truly burgage, and their owners are represented by the member for the borough\*.

Before concluding this branch of the qualifications of a freeholder's title, it will be proper to take notice of an exception which long prevailed in respect both to the manner of holding, and to the valuation, and indeed does, in a great measure, prevail, even at this day. We have seen, that, by all the acts of the parliament of Scotland, from the time of James I. downwards, none were allowed to vote, or to be elected, but those who held their lands immediately of the King or Prince, and that, when the old extent did not appear, it was, by the act 1681, made necessary to shew that the lands were of L. 400 of valued rent. But this notwithstanding, the vassals of subject superiors in the shire of Sutherland were always al-

D d

lowed,

\* had been decided by the parliament's judicative power as votes and resolves, which  
 ' yet were omitted to be engrossed in this act; the first was, where after an hospital  
 ' acquired a forty shilling land, holden of his majesty, the master had a vote with the  
 ' other freeholders in the election of commissioners to shires, and was capable to elect  
 ' and to be elected, provided they be infeft, and that they only sent one, though they  
 ' had never so many forty shilling lands. The second was, where one hath only a re-  
 ' signation of lands in his favour at the time of choosing the commissioners, and is  
 ' voting, but, before the meeting and down-sitting of the parliament, he is infeft, or  
 ' has got a confirmation from the King of his base infeftment, his vote is valid, though  
 ' he was not publicly infeft the time of the voting. But the parliament miserably va-  
 ' ried in thir points, as the wind of favour or prejudice tossed them;' *Vol. I. p. 154.*

\* June 17. 1777, Sir Robert Abercromby *contra* Alewood, and others.



lowed, not only to vote, but even to be elected commissioners for that county, and that, too, without being possessed either of the ordinary extent, or of the valuation required by law. There was, indeed, some reason for an indulgence in the first of these respects. All the lands in the shire were held, for a long time, of the Earls of Sutherland. There were no small barons within it who held of the crown. Of course, it could have had no representation, unless the Earl's vassals had been allowed to usurp the privilege of freeholders\*.

Of this singularity no public notice was taken by the legislature before the act of the 16th of George II. so often mentioned, which, after setting forth, that, by the constitution of the shire of Sutherland, and by constant usage, the Barons of that shire had been represented not only by the immediate vassals of the King and Prince, but also by those who held their lands of the Earls of Sutherland, and other subject superiors, and that such sub-vassals were in the practice of voting at elections as well as the vassals of the King and Prince, and without any restriction as to the *quota* of the old extent, or of the valued rent of their lands, whereby votes had been unduly

\* This district was erected into a sheriffdom in favour of the Earl of Sutherland, by an unprinted act of the first parliament of Charles I. cap. 32. It had formerly been reckoned a part of Caithness.

The shire of Kinross having been almost wholly acquired by the two noble families of Morton and Burleigh, sent no commissioner to parliament for a considerable time before the year 1681, when Sir William Bruce of Balcaiskie, who had then purchased the Earl of Morton's property in the county, was elected by himself and the few other freeholders. And it should seem, that he considered it to be necessary on that occasion to procure a letter from the King approbatory of his election, and confirming the privilege of the shire to send a commissioner to parliament in time to come. This appears from a minute of Parliament of the 18th of August 1681, which, as being a matter of some curiosity, is to be found in the Appendix No. 33.



duly multiplied, and claimed by several persons in respect of the superiority and property of the same lands, enacted, *1mo*, That, after the 1st of September 1745, no person should be capable to be elected a commissioner for that shire, or have a right to vote at such elections, without being infeft, and in possession of lands liable to his Majesty's supplies, and other public burdens, at the rate of L. 200 of valued rent. *2do*, That one person, and no more, should thenceforth be entitled to vote in respect of the same lands. *3tio*, That, where lands were held by any Baron or freeholder, immediately of the King or Prince, such Baron or freeholder, but not his vassals or sub-vassals, should be capable to be elected and to vote. *4to*, That, where lands were held of the King or Prince, by a Peer, or other person, or body politic or corporate, disabled by law to be elected a member of the house of commons, or to vote in such elections, the privilege should belong to the proprietor and owner of the lands, and that no alienation of the superiority to be made by such Peer, or other person, or body politic, should deprive such proprietor and owner of his right to vote, or of his capacity to be elected, or entitle the purchaser to that privilege. And, *5to*, That the property of lands of L. 200 Scots of valuation, held in part immediately of the King or Prince, and in part of a Peer, or other person, or body politic, incapable to elect, or to be elected, should be a sufficient qualification to the proprietor and owner, any law or usage to the contrary notwithstanding. The freeholders were likewise ordered to make up a roll of their number at the Michaelmas head court 1745, and to revise that roll at their subsequent yearly meetings, and meetings for election, according to the rules prescribed by the acts of Parliament made for regulating the elections of commissioners for shires in Scotland, which were declared to extend to the shire of Sutherland, as well as to the other shires, except in so far as it was otherwise provided by this act of the 16th of George II. in the particulars above mentioned.



The third qualification respecting the title is, that the claimant be infeft in the property or superiority of the lands on which he founds a right to vote.

The statute 1681 did not require that a person should be infeft for any length of time before he could be enrolled or have a right to vote. Alterations have, however, been made in this respect by two British statutes.

By an act of the 12th of Queen Anne\*, it was declared, that, from and after the determination of the then parliament, no conveyance or right whatsoever, upon which infeftment was not taken, and the feifine registered one year before the *teste* of the writs for calling a new parliament, or one year before the date of the warrant for making out a new writ for an election during the continuance of a parliament, should entitle the person or persons so infeft to vote, or to be elected at that election, in any shire or stewartry in Scotland. And, by the act of the 16th of George II.†, it was enacted, That no purchaser, or singular successor, should be enrolled, until he was publicly infeft, and his sasine registered, or charter of confirmation was expedited, (where confirmation was necessary) one year before the enrollment.

The last of these two statutes does not expressly repeal the former. It was accordingly objected to a person who claimed to be enrolled at the meeting for election in the county of Stirling in 1754, that he could not be admitted, because the date of the writ for calling the parliament was April 9. 1754, and his instrument of feifine was only registered on the 27th of April 1753. The freeholders

\* Stat. I. cap. 6.

† Cap. 11. § 10.



ders having rejected the claim, a complaint was preferred to the court of session, in which the claimant founded on the statute of George II. allowing those to be enrolled whose seifines had been registered a year before the meeting, and contended, that, as *posteriora derogant prioribus*, the act of the 12th of the Queen was in so far thereby repealed. To this the freeholders answered, that the maxim *posteriora derogant prioribus* only takes place where two things enacted by different statutes are incompatible; but that here there was no incompatibility; for the clause in the first act respected the right of voting, and of being elected, and the clause in the other respected only the privilege of being enrolled; and the freeholders would have enrolled the complainer at the meeting after the election of the commissioner to parliament was over, if another objection had not stood in the way: But it being replied, that the act of the 16th of George II. by having only required that a person be infest a year before he be enrolled, and by having, at the same time, in other clauses, impowered every one to vote who is enrolled, must imply a repeal of that clause of the act of the 12th of Queen Anne, on which the objection was founded, the court of session ordered the claimant to be added to the roll \*.

The propriety of this decision was never publicly contested till the period of the general election in 1780, when the objection was renewed, and strenuously maintained in several counties; but, in all the complaints that were brought before the court of session, the former judgment was adhered to. The question was treated very fully in a case from the stewartry of Kirkcudbright †. But, even there, it seemed to be admitted, that the claimant would have had some ground to complain, if, after the election was over, he had desired the

\* January 17. 1755, Buchannan of Carbeth *contra* Cunningham of Ballandalloch.

† December 1780, Alexander Gordon *contra* Richard Dalziel.



the freeholders to take his claim under their consideration, and they had then refused it. This was, however, by the other party, held to be decisive of the point at issue; because it was clear, that, at a meeting for election, the freeholders could make no alteration upon their roll after the election was over, their business being then at an end.

The court of session could only judge of the right to be enrolled, but not of the right to vote. That point came, however, to be solemnly decided by two committees of the House of Commons, appointed to try the merits of the controverted elections in the county of Orkney and in the stewartry of Kirkcudbright.

The Orkney committee sat first. Mr Charles Dundas was the petitioner. He was under the predicament of the act of Queen Anne, and the freeholders had refused to enroll him: At any rate, he could not make up a majority without counting his own vote. The objection, therefore, if sustained, would have fixed Mr Baikie the sitting member.

The argument upon the part of the sitting member came in substance to this, that there was no inconsistency between the two statutes, such as to render the one a virtual and necessary repeal of the other; that the legislature would have spoke it out in express terms, if it had been intended by the act of George II. to abrogate this clause of the act of the Queen, the more especially as another clause of that act had been repealed in clear and direct words; that, even supposing a repeal to have taken place to the effect of enrolment, and that the freeholders ought to have enrolled the petitioner, still he must have been barred, by the act of Queen Anne, from the right of voting, or of being elected; and that the argument drawn from the clauses of the act of George II. which order the votes of all those  
who



who stand upon the roll to be received, under severe penalties, did not apply, as many instances could be given of the laws denying that right to persons standing upon the roll. Freeholders who refused to take the oath of abjuration, or had been twice within the preceding year in a non-jurant meeting-house, were disabled from voting, although they still continued upon the roll. The preses of the meeting was no doubt subject to severe penalties, if he neglected to call for, or refused, the vote of any person who stood upon the roll, and was not disqualified to vote; but it were absurd to suppose that he should incur a penalty by refusing the vote of one whom the law had clearly disqualified. There was therefore an evident distinction between a right to be enrolled, and a right to vote, or to be elected; and, even supposing that, after the act of George II. all those whose seifines were registered a year before, were entitled to be enrolled, still the act of the Queen, which said nothing of enrolment, might subsist, to the effect of preventing those whose seifines were not registered a year before the *teste* of the writ from voting or being elected, as to which, the act of George II. was totally silent.

To this it was answered for the petitioner, that the regulation of the act of the Queen was introduced to prevent fictitious or occasional qualifications, which, at the time of an election, there might not be an opportunity thoroughly to investigate; that this might prove an effectual remedy to that particular evil, but others were afterwards discovered, and for these it became necessary to seek new remedies; that the act of the 16th of George II. was accordingly passed for that purpose; and that, by that statute, the system of the law, with regard to elections, and the qualification of electors, was, in many respects, put upon a very different footing from that on which it formerly stood; one of the evils of which notice was taken in the preamble was, 'that returning officers had of late presumed

' to



‘ to act in a most partial and arbitrary manner; sometimes upon  
‘ false pretences, that the rolls of electors of commissioners for shires  
‘ were not regularly made up; and sometimes without any pretence  
‘ at all;’ the legislature, therefore, resolved to put the rolls of the  
freeholders upon a clear and unambiguous footing; to define what  
rights were sufficient to entitle a person to be admitted to them; to  
create a new jurisdiction in the court of session, empowering it to  
review the proceedings of the freeholders in questions of enrolment;  
to ascertain to whom, in the event of an equality, the casting vote  
in the choice of preses and clerk was to be allowed; and to compell,  
by the sanction of high penalties, those whose duty it was to collect  
the votes to call every person who stood upon the roll, and to receive  
the vote of every such person, against whom no disqualification lay  
that was personal and independent on the titles on which he was  
enrolled; the statute accordingly directed, that the persons then  
standing upon the rolls last made up should be the constituent mem-  
bers at the next Michaelmas meeting, or meeting for election, to re-  
vise these rolls; and, as the great object of the legislature was to  
debar persons from getting upon the roll who had not a good right  
to elect or to be elected, so, in order to prevent surprise, and to give  
the freeholders an opportunity of fully considering the business that  
was to come before them, all claims or objections to be presented or  
moved at the Michaelmas meetings, were ordered to be lodged with  
the sheriff-clerk two kalendar months before, and every person who  
thought himself aggrieved by the proceedings of the freeholders, was  
authorised to bring them under the review of the court of session  
within a limited time; these regulations were not, however, deem-  
ed sufficient to maintain the purity of the roll of electors; the le-  
gislation, therefore, jealous of all recent titles, resolved to follow out  
the spirit of the act of the 12th of Queen Anne; and, in order to  
put an effectual stop to every abuse that might be introduced by ad-  
mitting persons to the roll upon such recent titles, it was farther  
enacted,



enacted, 'that no purchaser, or singular successor, shall be enrolled till he be publicly infeft, and his seifine registered, or charter of confirmation be expedie (where confirmation is necessary) one year before the enrolment.' Other limitations were at the same time imposed; and the rights sufficient to admit a claimant to the roll of electors being thus clearly defined, and the partiality of a majority of the freeholders guarded against in the most anxious manner, the next object of the statute was to secure to those who were admitted, every privilege which they thereby acquired, by ordering the roll of electors last made up to be called over at every election of a commissioner, and by inflicting severe penalties upon those whose duty it was to collect the votes in the different stages of the business, in the event of their not calling for, or refusing the vote of any person whose name was upon that roll. Such being the objects, and such the particular enactments of the act of the 16th of George II. it was clear that the clause of the preceding act of Queen Anne must have been thereby repealed. Every person who was possessed of the estate required by law, was entitled to be enrolled, provided his infeftment was recorded one year before the meeting. It could therefore afford no objection to a claimant, at a Michaelmas meeting, that his infeftment, although then a year upon record, had not been registered a year before the *teste* of the writs, which happened to be issued a month or two before, for calling a new parliament; and, as every person whose name stands upon the roll last made up must be called, and his vote received, unless subject to personal disqualification, it necessarily followed, that the clause of the act of Queen Anne must have been virtually repealed, it being altogether inconsistent with the subsequent statute. The distinction made on the part of the sitting member, between a right to be enrolled and a right to vote, in so far as these depended on the titles, was not founded in the law. In common speech, the roll was called the *roll of freeholders*, but, in the



language of the legislature, it was the *roll of electors*; so it was called in the act 1681, in the act of the 1st of George I. and both in the preamble, and in sundry passages of the act of the 16th of George II.; and that the legislature had no idea of the distinction between a right to be enrolled and a right to vote, was farther confirmed by the latter part of that very paragraph of the last of these statutes, which prohibits purchasers to be enrolled till a year after their enrolment, as it immediately adds, 'and that no apparent heir shall be enrolled until his predecessor's titles are produced, and allowed by the freeholders as a sufficient qualification for his *voting* for a member of parliament.' Nor was it of any consequence that a person, though standing upon the roll, might, upon a particular occasion, lie under a personal disqualification: Such disqualifications were altogether casual, and depended upon contingencies which could not be foreseen; but the nature of a title to be enrolled was obvious, and not liable to any such contingency. The law, therefore, in that respect, had made no distinction between the right to be enrolled, and the right to vote or to be elected. The latter was a necessary consequence of the former, insomuch that, although a person, either by accident or by favour, were to be enrolled upon an insufficient title, he would continue upon the roll, and have a right to vote during life, unless a complaint were preferred against his enrolment to the court of session within four kalendar months, or an alteration in his circumstances should take place.

This argument satisfied the committee of Mr Dundas, the petitioner's, right to vote at the election; and they accordingly resolved to sustain his vote, which he had declared at the meeting under protest: But a doubt being still entertained, whether the act of Queen Anne could be held to be repealed, so far as it related to the eligibility of those whose seifines were not recorded a year before the *teste* of the writs, one counsel on each side was directed to argue that point.



point separately. That was accordingly done; and the counsel for the petitioner laid it down as a maxim, that the right to vote, and the right to be elected, were tantamount, and that both the one and the other were a necessary result of being upon the roll: He accordingly went through the several statutes from the time that the representation of the small barons was introduced; and, after shewing that no distinction appeared in any of them between the title to vote and the capacity to be elected, he concluded his argument by what appeared to him to be decisive of the question, viz. that the act of the 16th of George II. had enacted, that every person chosen in his absence to serve in parliament for a shire in Scotland, should, before his taking his seat in parliament, 'take the oath appointed to be taken by every freeholder who shall claim to vote at any election of a member to serve in parliament, by the act of the seventh year of his present Majesty, (entituled, an act for the better regulating the election of members to serve in the House of Commons for that part of Great Britain called Scotland, and for incapacitating the judges of the court of session, court of justiciary, barons of the court of exchequer in Scotland, to be elected, or to sit or vote as members of the House of Commons), before the Lord Steward of his Majesty's household, or any person or persons authorised by him for that effect, which he or they are hereby impowered and required to administer; and, if a member to serve in parliament, so elected, shall neglect or refuse to take the aforesaid oath, such election shall be void \*.' The committee accordingly resolved that the petitioner was eligible.

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\* The oath here referred to is the oath of Trust, or Possession, to be taken notice of in the sequel.



The Kirkcudbright committee met in a day or two after. There was there no question of eligibility, because the objection did not apply to the petitioner, but only to some of the voters in his interest; and, although their votes were strenuously objected to on the part of the sitting member, they were sustained. The same objection might have been renewed in the Airshire committee, but the counsel for Major Montgomery, the sitting member, did not insist upon it. It were indeed to be much lamented, if different committees were to give opposite decisions upon the construction of acts of parliament.

The act of George II. says, that the seifine must be registered one year before the enrolment; and it has been made a question when that year expires. Two gentlemen had been regularly infeft in lands in the county of Dumbarton, sufficient to give them freehold qualifications, and had got their seifines recorded at six o'clock of the afternoon of the 15th of September 1779. The meeting for electing the representative of that county to the last parliament was held upon the 14th of September 1780. These gentlemen could not ask to be enrolled upon that day; but the business not being finished, they presented their claims at three of the clock of the morning of the 15th; and, it having been objected, that the year had not then expired, in respect that the meeting having begun upon the 14th, was to be considered as of that date only, the majority of the freeholders refused to enrol. The claimants complained to the court of session; and, in answer to the objection, they observed, that there was no statute declaring that all the proceedings at an election must be considered as of the date of the commencement of the meeting; and that, although the sheriff's return might perhaps bear that date, yet the minutes must be the rule for determining whether a particular claim had been presented on the first, second, or third day of the meeting; and, in answer to a new objection, first moved in the court of session, that their seifines being only recorded in the afternoon,



noon, the year had not expired in the morning of the same nominal day, it was said, that, although in the natural measurement of time, there is not a full year between the afternoon of one anniversary and the morning of another, yet it was otherwise in the eye of law, it being a maxim, that *dies inceptus pro completo habetur*, and that the court had so determined in a case somewhat similar, Elliot of Arkleton *contra* Fergusson of Craigdarroch, where an objection made to a claim, that there wanted two hours of the two kalendar months from the time of its being lodged with the sheriff-clerk, was repelled. The court found, that the freeholders did wrong in rejecting the claimants, and ordered them to be added to the roll \*.

The date of presenting seifines to the keeper of the register, and of his marking them in the minute-book, which contains a short note of them, is reckoned the date of the registration, although they should not be actually inserted at length in the record for some time after †. Taking matters strictly, this may appear contrary to the tenor of the acts of parliament, which require the actual recording, and no where say that an entry in the minute-book is sufficient. But, from the general practice, of which a clear proof was brought in the case here referred to, and from the necessity of the thing, a number of seifines coming often in at once, so as to render it impossible to record them all in a short space of time, the court were properly induced to hold the entry in the minute-book as equivalent. A different judgment might, indeed, be productive of much mischief in more important concerns than political questions. Seifines are not good against purchasers or creditors, unless recorded within sixty days of their dates; but it may sometimes be impossible to insert a number of them at length in the record within that time, especially

\* January 1781, Telfers *contra* Ferrier.

† February 9. 1768, Sir Alexander M'Kenzie and others *contra* M'Leod of Cadboll and others.



specially if it be neglected to bring them to the keeper of the register (which is often the case), till it be nearly expired. In this case, the entry in the minute-book was regular, and signed, as the law directs, by the keeper of the register and by the presenter of the feifines. But, in some other cases from the shire of Murray, the entry, though made in the minute-book, was not signed, owing to the keeper being from home when the feifines were brought to his office. They were, however, in consequence of the practice, as proved in the case of Sir Alexander M'Kenzie, sustained by the court of session\*.

A charter of confirmation † must be *expede* a year before enrolment. And, as a charter cannot exist without the great seal, the date of its being sealed is, of course, the date of the charter.

The freeholders have no right to call for the warrant of the charter on which the infeftment proceeds, or to object that it is not conform to the signature ‡, or to enter into a discussion of a claimant's progress §. His own charter and infeftment are all that they are

\* July 8. 1774, Earl Fife *contra* Gordon and others. In this case it was likewise found by the court, that freeholders may competently insist in a declaratory action, for the purpose of ascertaining the dates of the registrations of feifines on which claims are entered for enrolment, but not before the claims are so entered.

† A charter of confirmation is a charter from the crown, confirming an infeftment granted by a subject superior, in consequence of a disposition to hold either of himself or of the crown, and, after the charter is *expede*, the person to whom it is given becomes the immediate vassal of the crown, and has no more connection with, or dependence upon, the original disponent.

‡ February 17. 1779, Burn of Coldoch *contra* William Adam. The signature is a warrant given by the Barons of Exchequer for the issuing of a precept to the keeper of the privy seal, to issue his precept to the keeper of the great seal to make out the charter.

§ By a progress, in the law of Scotland, is understood the chain of title-deeds by which a person holds his lands.



are concerned with ; and, if these are, *ex facie*, formal, he must be enrolled. A court of freeholders has no authority to cite witnesses, or to administer oaths. Although, therefore, it were objected to a claimant, that a disposition conveying to him the precept in a crown charter was forged, they could not try that fact, and he would still be entitled to demand of them to enroll him, while it remained unchallenged, and until it should be set aside by the court of session in a proper process of reduction. That court has, however, relaxed, in some degree, from the strictness of the rule, that, in every case, a charter from the crown, and an investment in the person of the claimant, are to be held as *probatio probata* of his right to be admitted to the roll. When an objection is palpable, and can be established under his own or his author's hand, without any farther investigation, they hold it competent to reject the claim. Thus, in a case formerly mentioned, Sir Robert Abercrombie *contra* Alewood, and others, June 17. 1777, several qualifications, created by Earl Fife on certain fishings in the river Doveran, were rejected, first by the freeholders, and afterwards by the court of session, in respect that it appeared, from a deed under the late Earl's hand, that these fishings were held of the royal borough of Banff, and not of the crown. A similar judgment was pronounced in the course of the same session\*. Every nullity that appears, *ex facie*, of the claimant's charter or investment is, however, fatal to the freehold qualification claimed upon them.

Sir John Gordon of Invergordon, conveyed to Ross of Priesthill, in liferent, and to Gordon of Carroll in fee, three different parcels  
of

\* 1777, Alexander Pierie *contra* Hay of Mordington. If the party, however, can show, to the satisfaction of the court, that, in the deed founded on, he or his author had committed a mistake, and had erroneously supposed that his lands were held of a subject, when, in reality, they were held of the crown, I apprehend that such error ought not to hurt his right.



of land, viz. *1mo*, A part of the lands of Easter Aird and Easter Tarbat. *2do*, A part of the lands of St Martins. And, *3tio*, A part of the lands and estate of Meikle Tarrel. But, in the instrument of seifine in favour of these gentlemen, the notary only mentioned their being infeft in the lands of Easter Aird, Easter Tarbat, and St Martins, neglecting to mention Meikle Tarrel; and, it having been objected, that it did not appear that they were infeft in the whole of the lands contained in their claim, the objection was sustained by the court, although there was strong reason to believe, from the latter part of the instrument, that infeftment had actually been taken in the whole, as it concluded in these words: ‘Acta e-  
 ‘rant haec super fundum omnium et singularum partium, seu por-  
 ‘tionum praedictarum terrarum de Easter Aird, Easter Tarbat, et  
 ‘*Meikle Tarrell*, respective et successive\*,’ &c. It is a remarkable circumstance, that this objection, which did not occur to the parties, but was stated from the bench, had the consequence to determine the election for the county of Cromarty in 1768, in favour of Mr Pulteney.

A nice feudal question arose about the same period. David Ogilvy was enrolled a freeholder of the county of Forfar, at Michaelmas 1767, upon the following titles, *1mo*, Charter under the great seal, in favour of William Earl Panmure, of a number of different lands, and, amongst others, the lands of Auchmull. *2do*, A conveyance of these lands of Auchmull to Mr Ogilvy in liferent, and to the Earl in fee, and an assignment of the precept in the Earl’s charter so far as it respected them. And, *3tio*, An instrument of seifine upon that precept. Against this enrolment a complaint was preferred to the court of session, by certain freeholders standing on the roll, who insisted, that the seifine was null, in respect that infeftment had  
 not

\* February 18. 1768, M’Leod of Cadboll *contra* Ross of Priesthill.



not been taken upon the several different tenements or parcels of which the qualification was composed, although they were discontinuous, but had been taken at one part for the whole. To this it was answered, that Lord Panmure's charter contained a dispensing clause in the following words: 'Quod unica fasina per dictum Wilhelmum Comitem Panmure ejusque praedict. super aliqua parte fund. dict. terrarum, nunc et omni tempore futuro, per deliberationem terrae, et lapidis fundi earundem, absque ullo alio symbolo, sufficiens erit pro integris terris, baroniis, molendinis, decimis, piscationibus, aliisque supra script. cum pertinent. vel quavis earundem parte, non obstant. quod discontigue jacent.' The complainers admitted that such dispensing clauses had been established by usage, and were effectual, so long as all the lands granted by the charter remained vested in one person; but contended, that whensoever the union came to be dissolved by an alienation of a part, the dispensation was at an end, and that infeftment must thereafter be taken upon each of the separate parcels, according to the common rules of law. Mr Ogilvy, in opposition to this, founded upon several instances, where, upon a partial sale of lands, granted by charter from the crown, and upon an assignation of the unexecuted precept contained in such charter, infeftment had been taken at one particular part for the whole, pursuant to the dispensation of the charter. These instances were, however, of a recent date, and the court sustained the objection\*. But their judgment was reversed in the House of Lords†.

A stronger case came from the county of Linlithgow, where the infeftment was taken, in virtue of a dispensing clause, at a place

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which

\* January 19. 1768, George Skene and Charles Hunter *contra* David Ogilvy.

† March 4. 1768. The same judgments were severally pronounced in the Court of Session and House of Lords, in thirteen other similar cases from the county of Forfar.



which was not even conveyed to the claimant, but to another person\*.

The title of one who claims to be enrolled as a proprietor of land † must be absolute, and not dependent on the will of the person from whom it is derived. A revocable disposition is not sufficient, because it is no better than a redeemable right, reprobated by the act of the 12th of Queen Anne ‡, which enacted, ‘ That no infestment taken upon any redeemable right whatsoever, except proper wadsets, adjudications, or apprisings allowed by the act of parliament relating to elections in one thousand six hundred and eighty one, shall entitle the person to vote or be elected in any shire or stewartry.’ Neither will a conveyance, containing a reserved

\* The case here alluded to is that of David Dundas, Esq; This gentleman’s claim being rejected by the freeholders, upon the objection made to his infestment, he complained to the court of session, who dismissed his complaint; December 19. 1767. After the judgment of the House of Lords in the case of Ogilvy, he applied to be enrolled at the meeting for election in April 1768, and was enrolled accordingly; but, in a complaint preferred to the court of session, upon the footing that their former decree was *res judicata*, until reversed upon an appeal, the court found, November 15. 1768, ‘ That the former decree sustaining the objection to Mr Dundas being enrolled was a *res judicata*, which barred the freeholders from proceeding to consider the claim presented by him to them upon the 16th of April last; and, therefore, granted warrant for expunging him from the roll.’ Mr Dundas, upon this, appealed from both decrees, and both were reversed, March 5. 1770. The case of Doctor Glen, from the same county, was similar. The court of session sustained the objection; but their decree was reversed.

† By proprietor it is not here meant to distinguish between one who has the full enjoyment of the lands in which he is infest, and one who has only the superiority; the word is only used in contradistinction to those who have acquired temporary rights, as liferenters, or redeemable rights, as wadsetters.

‡ Stat. I. cap. 6. See July 3. 1753, Abercromby *contra* Gordon.



reserved power to the grantor to burden or alienate the lands without the consent of the grantee, be sustained, even though such power be expressly renounced, unless the renunciation be recorded in the register of feifines and reversions, a year before the meeting at which the grantee claims to be enrolled\*. This is not expressly enacted by any statute, but it is perfectly analogous to that clause of the act of George II. which requires the registration of an absolute infeftment to be a year before the enrolment. It is the renunciation of the reserved power that alone gives a title to the disponee to be admitted to the roll of freeholders, and, of course, such renunciation ought to be recorded as long as an infeftment upon an absolute and indefeasible conveyance.

It was, however, found, that an infeftment upon a disposition which contained a proviso, that no debts contracted, or deeds done, or to be contracted or done by the disponee, during the life of the disponer, without his consent, should affect the lands or the rents, was a sufficient title†.

In this case it was pleaded, that the claimant had, in effect, no estate at all during the life of the disponee. But, it was answered, That he was in the absolute and irredeemable right of the lands; that, as there was no prohibition against selling, and no declaration that the debts contracted by him should be void and null, the restrictive clause of the disposition was nugatory and ineffectual; and that, besides, it was common for persons to be admitted to the roll who were fettered, even with the strictest entails.

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\* January 17. 1755, Dundas of Manners *contra* Craig of Dalnair. January 14. 1761, Lauchlan Grant *contra* Alexander Hay younger of Cocklaw.

† January 5. 1762, Goldie of Southwick *contra* Gordon younger of Campbeltown.



It has been made a question, whether an infestment proceeding upon a disposition granted by an heir of entail, who is strictly barred from the power of alienating the lands, can afford a title for enrolment; but, it being answered to an objection made on that head, that a conveyance by an heir of entail, however strictly fettered, is good against every mortal but the substitutes or remainder men, and that it was *jus tertii* (incompetent) to any third party to plead in their right, the court of session sustained the titles produced for the claimants, and ordered them to be added to the roll\*. It is, however, rash and dangerous for heirs of entail to grant such conveyances, as, by so doing, they expose themselves to the hazard of suits at the instance of substitutes, even the most remote, for declaring their right to the estate irritated and forfeited. The method most commonly used, and esteemed the safest, is to grant only life-rent rights, and to trust to the honour of those upon whom they are bestowed; to renounce them, in the event of a challenge being made by any of the substitute heirs of entail.

By the law of Scotland, no superior can interpose another person between himself and his vassal, or split the right of superiority into parts, so as to multiply superiors upon him. This rule is, indeed, strongly founded in the principles of the feudal law, which admitted not of the Over-Lord's exercising his lordship to the prejudice of his vassal, beyond the limits of the grant or contract by which they were connected with each other. To one superior alone the vassal was bound to pay homage, and to perform the other duties incumbent upon him; and from that superior he and his heirs were entitled

\* February 5. 1760, Campbell of Shawfield and Graham of Gartmore *contra* Muir of Caldwell. See also the argument in the case of Mr David Dalrymple, &c. *contra* Reid, March 4. 1755. It makes no difference, that it appears, from the titles produced by the claimant, that his author was barred from the power of aliening, or even of granting life-rent rights. See January 23. 1781, Houston *contra* Ferrier.



entitled to demand a renewal of the investitures, when necessary. But, if the superiority could be split, at the will of the Over-Lord, into different parcels, the vassal must not only have been liable to pay homage to different Over-Lords, but must also have been obliged to resort to each of them before he could obtain a renewal of the investitures by which the property of his land was to be vested in him. This notwithstanding, attempts have of late been made to justify a superior's parcelling a superiority into parts. In a case from the county of Ayr, it was strenuously maintained, that now, when homage is out of fashion, and the duty of the vassal consists only in paying his yearly feu or blench duty, and the casualties of superiority, or feudal incidents, there could be no harm in allowing superiors to create two or more liferent freehold qualifications out of one superiority. And, in order to remove any appearance of hardship upon the vassal by this multiplication of superiors, it was observed, that the granter of these liferents, to whom the right of fee was still reserved, was fully entitled to renew the investitures of the vassal, without the consent or concurrence of the liferenters. But to these arguments the court of session paid no regard; and the titles, by which a multiplication of superiors upon the vassal was attempted to be imposed, were set aside as void and null\*.

This point came again to be more warmly contested in a later question, between the Duke of Montrose and Sir James Colquhoun of Luss. Sir James held a considerable estate of the family of Montrose, consisting of a variety of different lands, for which separate acknowledgements were payable to the superior, but all comprehended in one investiture. The family of Montrose, in the view of increasing their political interest in the county of Dumbarton, split this superiority into a number of parts, for the purpose of creating  
an

\* July 1780, Sir John Anstruther *contra* the Earl of Eglinton, and others.



an equal number of liferent freehold qualifications. Sir James brought the conveyances to these different liferenters under challenge, by an action of reduction; and, although, besides the general plea, it was maintained for some of the defenders, who had obtained liferents of distinct parcels, for which separate *reddendos* were payable, without any connection with other parcels, that it was to be presumed that the lands severally conveyed to them had, originally, been distinct and separate fees, and that the circumstance of the superior's having voluntarily included them all in one charter, ought not to prevent him from bringing matters back to their former state, the court of session paid no regard to that distinction, but set aside all the conveyances brought under challenge\*.

If, however, the vassal, upon whom a multiplication of superiors is attempted, do not choose to complain, no other person is supposed to have any title to interfere; and hence it has been held to be *jus tertii* to the freeholders to object to a qualification on that account. So it was determined by the court of session in a case from the county of Wigton in 1761†; and in another from the county of Kinross in 1779‡. And, although, in some questions that came from the county of Ayr in 1780||, one or two of the Judges seemed to be of opinion that it was competent to the freeholders to make the objection, yet, in subsequent cases from the same county in 1781, the maxim of *jus tertii* was carried to a great length, inasmuch, indeed, as to prevent the freeholders from founding upon an action of reduction, already brought by the vassal against his superior and his assignees,

\* January 31. 1781, Sir James Colquhoun *contra* the Duke of Montrose, and others. This judgment was affirmed in the House of Lords, February 19. 1782.

† July 28. 1761, Mr Walter Stewart, and others, *contra* Mr David Dalrymple.

‡ 1779 Routledge *contra* Adam.

|| Fergusson *contra* Montgomery, and others.



assignees, for the purpose of setting aside the conveyances upon which the qualification was founded. Of these, one instance shall be given.

Campbell of Skerrington held certain lands, and, *inter alia*, the two merk land of Horsecleugh, of the Earl of Dumfries, who, in 1774, conveyed the superiority of these lands to different persons in liferent, for the purpose of giving them freehold qualifications. Upon these conveyances, infeftments were immediately taken; but, as none of the disponees made any demand upon Mr Campbell, he remained ignorant of these proceedings till within a short time of the general election in 1780, when he took the proper steps for getting them set aside, by bringing a suit of reduction before the court of session. Captain Sloan Laurie, one of the disponees, claimed to be enrolled at Michaelmas 1780, upon the two merk land of Horsecleugh, and certain other lands; but to this claim Mr Campbell, who was himself a freeholder, objected, that the claimant's titles to these lands of Horsecleugh were null, as tending to create an undue multiplication of superiors upon the vassal; and, in order to remove the plea of *jus tertii*, he produced his summons of reduction duly executed against the claimant. The freeholders sustained the objection; but, upon a complaint being preferred, the court of session found that they did wrong in refusing to enrol Captain Sloan Laurie, and ordered his name to be added to the roll \*. Against this judgment a reclaiming petition was preferred, in which the merits of the question were fully stated. It was, in the *first* place, contended, that a deed which infers a multiplication of superiors upon the vassal, and is granted without his consent, is altogether void, and, *ipso jure*, null; and that, as Mr Campbell had declared that he neither

\* February 1. 1781. Captain Sloan Laurie *contra* Hamilton of Sundrum and Campbell of Skerrington.



ther consented to the conveyance, nor would acknowledge the claimant as his superior, and had likewise produced his executed summons of reduction as a proof of his purpose, the freeholders could not fail to be satisfied, that, as the conveyance, hitherto, had been attended with no effect, so it could never be attended with any, and were therefore not only entitled, but bound in duty, to disregard it, and to reject the claim: That the plea of *jus tertii* could not take place in a question of that sort: That it was not *jus tertii* to Mr Campbell to make the objection, for he founded not on the right of any third party, but upon his own right, and had certainly both a title and an interest to oppose any person's exercising a privilege as his superior who had no legal claim to that character: That there seemed as little room for that principle in considering the proceedings of the other freeholders; for, although it might be *jus tertii* to a *suitor* to found upon the right of a third party with whom he was not connected by conveyance or inheritance, it could not with any propriety be said to be *jus tertii* to a *judge* to determine matters falling under his cognisance; and that the freeholders, when considering the qualifications of claimants, acted in a judicative capacity, and were bound to take notice of every objection which was instantly verified, and needed no investigation or proof. In the *next* place, it was observed, that, as one claiming to be admitted to the roll of freeholders must not only produce a title to the lands, but also be in possession, so, in this case, it was perfectly clear, that the claimant neither had obtained, nor ever could obtain, the possession of the lands of Horsecleugh, as Mr Campbell, the vassal, refused to acknowledge him, and not being bound to do so, was at liberty to withhold from him all the duties payable to his true superior, even *ope exceptionis*, without the necessity of a reduction for setting aside the conveyance in the claimant's favour. Under this branch of the argument it was farther stated, that, with respect to the possession, which was a mere question of fact, it was impossible to object the  
plea.



plea of *jus tertii*, or incompetency; that, if a person were to claim upon lands, which, by undeniable evidence, were proved to be in the possession of another, it would be absurd to suppose that the freeholders were not at liberty to listen to that evidence; and that it must be equally competent to them to reject a claim when it is proved to them that the claimant neither is actually in possession, nor has a legal title to possess; that, if Mr Campbell, before the meeting of the freeholders, had obtained a decree of the court of session, annulling the claimant's titles, the claimant could not have been enrolled, but that, *quoad* the question of possession, such decree could have added no force to the objection; for the production of Mr Campbell's title deeds proved the nullity of those in the person of the claimant, and, joined to the evidence of his publicly disowning the claimant for his superior, afforded demonstration that no possession had followed upon his right, and that none could be obtained by him in consequence of that right. These arguments were certainly very specious; but they were disregarded by the court; and the petition in which they were stated was refused\*.

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\* There was not time for getting this question brought forward in the House of Lords before the sitting of the committee of the House of Commons, appointed to try the merits of the controverted election for the county of Ayr. Mr Sloan Lawrie, and some others in similar circumstances, were accordingly added to the roll, in consequence of the decrees of the court of session; but their votes were strenuously objected to before the committee; and, in support of the objection, it was contended, that how much soever the court of session might consider themselves bound to enrol these claimants, while their titles remained unreduced, the committee ought not to admit the votes of persons whose titles would, in a short time, be found by the decree of that very court to be not only then void and null, but to have been so from their dates. It was farther observed, that whatever regard a court of law might pay to the plea of *jus tertii*, it were absurd to suppose that a committee of the House of Commons, when judging of a right to a seat in their house, could be fettered by a plea of that sort, so as to bind them to receive the votes of those who had no legal qualification; and that, if the votes in question were to be sustained, a door would be opened for much evil:

For,



A question, different in some respects, but similar as to the point of possession, may, with propriety, be taken notice of here, although we are not yet come to that branch of a freeholder's qualification. Sir John Anstruther held the Lordship of Giffen blench of the Earl of Eglinton for payment of one penny Scots, *si petatur tantum*. The Earl split this superiority into different parts, for the purpose of creating liferent freehold qualifications; and to each of these liferenters he conveyed 'the feu-duties of the lands, and others, above disposed, payable to him by the feuers thereof, from and after the term of Whitsunday 1773, and in time coming, during his life, with the whole casualties of superiority, non-entry duties, and others arising from the said rights.' There was an inaccuracy in these conveyances, for the Earl's vassal did not hold the lands feu, but blench of his Lordship; there were therefore no *feu-duties* to be conveyed. The decision, however, did not turn upon that circumstance. Besides the objection of an undue multiplication of superiors, which was stated in the meeting of the freeholders to the claims of these liferenters, and upon which these claims were rejected, it was farther objected in the court of session, that, as Sir John Anstruther, the vassal, paid only one penny Scots, *si petatur*, for the whole Lordship, so that blench duty neither was divided, nor was divisible, and each claimant had only a right to an undivided share; but that it was an established maxim, that no person could be qualified

For, as the conveyances granted by the Earl of Dumfries were unknown to the vassal till within a short period of the election, when he had not time to get them set aside; so although they were unquestionably to be annulled in the course of a few months, they might be revived in the same concealed manner, and be again made the foundation of freehold qualifications at the next general election. The counsel for Major Montgomery had great confidence in these arguments; but the committee, contrary to their expectation, sustained the votes. The decision of the House of Lords, in the case of Sir James Colquhoun *contra* the Duke of Montrose, had not then been pronounced.



fied to vote as a freeholder, without having a distinct property and a distinct possession; that it had been so found in the case of Sir Michael Stewart against Captain Pollock, March 9. 1760; and that, in the contested election for the county of Dumbarton in 1724, the committee of privileges and elections came to the following resolution, which was approved of by the house: 'That it is the opinion of this committee, that any conveyance of undivided shares of the superiority of any lands in the shire of Dumbarton, in order to multiply votes, or split an interest in such superiority amongst several persons, with a view to enable them to vote, is contrary to the act of parliament made in Scotland in 1681, intituled, Act concerning the election of commissioners for shires.' To this it was answered, that this resolution was not applicable to these claimants, and that they were in a very different situation from Captain Pollock, between whom and his brother the lands were undivided, as well as their extent and valuation; whereas, here, the lands were divided, and each division had a separate proportion of the valued rent allotted to it, and the casualties incident to a blench holding would undoubtedly fall to the different claimants for the respective lands severally conveyed to them; that the objection came, therefore, simply to this, that they could not separately demand any particular proportion of the penny of blench duty payable by the vassal; but it was well known that blench duties of that kind were never demanded; and how competent soever it might be to the vassal, in the event of its being demanded from him, to insist for a joint discharge from all these different superiors, or to refuse to pay a particular proportion of the penny to any one of them, still it must be a matter of no consequence to him, or to any other person, in what manner they might agree to divide it amongst themselves after they had recovered payment of it from him. The court of session sustained the objection \*.

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\* March 1780, Mr George Fergusson *contra* Montgomery of Broadley and others.



The same point was again brought under the consideration of the court in January 1781, when a similar judgment was pronounced\*. But an appeal having been taken in that case, the decree was reversed in the House of Lords.†.

Attempts were likewise made, though without success, to extend this objection, by analogy, to the case of feu-holdings. But the court of session distinguished these from blench holdings, upon this ground, that, although lands conveyed, *pro diviso*, to different superiors, are held by the vassal for one *reddendo* in name of feu-duty, there is no *pro indiviso* possession, as, without any operation of the law, the feu-duty divides itself in proportion to the different shares of the superiority held by the different superiors; whereas a blench duty is, at least in general, incapable of division.

Two cases of a singular nature came from Ayrshire at the general election in 1780. The claimants had each of them conveyances to certain parts of the barony of Ochiltree, which was held of the Earl of Glencairn for a yearly feu-duty of L. 5; but, instead of assigning to them, in general terms, the feu-duties payable out of their respective lands, these conveyances gave to each of them 'the sum of five shillings Sterling yearly, as a proportional part, applicable to the

\* January 23. 1781, James Ferrier *contra* the Honourable Henry Erskine. The reporter of this case mentions the following observation to have been made on the bench: 'The superiority of a tenement holding blench cannot be divided. A blast of a horn, a rose, a pair of spurs, cannot be delivered in parts. Where a part of a superiority of this nature is disposed, no possession can be attained on it. A qualification founded thereon is purely nominal and fictitious, and Mr Erskine's enrolment, on this account, was unwarrantable.'

† April 17. 1782. No appearance was made by the respondent in support of the decree of the court of session. The pleadings before the court were, however, maturely considered by the noble Lord who moved for the reversal.



‘ the lands and others above disposed, of the feu-duty of L. 5 Sterling, payable by the feuers and vassals for the whole barony of Ochiltree, contained in the said feu rights and infeftments thereof, and a proportional part of the compositions, and other casualties of superiority, corresponding to the said feu-duty of 5 shillings yearly.’ It was accordingly objected, that, instead of having a right to the casualties of the superiority of their own lands, the value whereof was to depend upon the rents of the parcels severally disposed to them, they were to enjoy a certain fixed proportion of the casualties of the whole barony without any consideration, whether that proportion was just and adequate or not. The objection was, however, over-ruled \*.

It is not necessary, in order to get upon the roll of freeholders, that a claimant be infeft as absolute proprietor of the estate upon which he claims:—Even a temporary right is sufficient, provided it does not depend upon the will of another.

Thus, the act 1681 allows the privilege of voting for a commissioner to parliament to persons infeft in an estate for their own life; and the granting of liferent rights is now become the most common mode of creating freehold qualifications, when estates are split for the purpose of increasing or supporting a political interest †.

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\* February 1. 1781, Sir Alexander Don *contra* John Bushby. *Eodem die*, James McRae *contra* John Bushby.

† It has become customary to take infeftment only in the name of the liferenter, by which means the precept for giving the infeftment remains entire *quoad* the fee; and the same charter may be afterwards made use of, for the purpose of creating a new liferent qualification, upon the death or renunciation of the former liferenter; whereas, if the precept were exhausted by infefting the *fiar* likewise, no new liferent qualification could be made without a new charter, which is expensive.



When lands are conveyed to one in liferent, and to another in fee, both fiar and liferenter are entitled to be enrolled; but the liferenter having the immediate interest, the fiar can only vote in his absence, or in the event of his declining to vote, or being subject to some temporary personal disqualification, (such as his being at that time an officer of the customs or excise), if present at the meeting.

Husbands are, by the same statute, entitled to vote in right of the freeholds belonging to their wives, although they have no infestment in their own persons \*. The wife must, however, be herself infest; and, even in that case, the privilege does not extend to every kind of freehold qualification. By the act 12mo Anne †, it was expressly provided, 'that no husbands shall vote at any ensuing election by virtue of their wives infestments, who are not heiresses, or have not right to the property of the lands on account whereof such vote shall be claimed.' This clause is rather ambiguous, and might have been more clearly expressed. It excludes husbands from  
voting

It is common to purchase annuities, depending, not upon the lives of the purchasers, but upon the lives of others. Supposing, therefore, a person to receive a conveyance to an estate in Scotland, not in liferent, but to remain with him during the life of a third party, and to return afterwards to the granter, *quaeritur*, Will such person be entitled to be admitted to the roll of freeholders? He has an equal right to the estate during the life of the third party, with one to whom an estate is conveyed during his own life; but still he is neither fiar nor liferenter, and therefore cannot be enrolled.

\* This is reasonable; and, of old, husbands even attended the parliaments, or great councils of the nation, in right of the estates of their wives. From the record of a parliament held at Scone, February 5. 1284, in the reign of Alexander III. we learn, that more than one appeared in that right. In 1291, Edward I. summoned the ladies of Cumberland and Westmoreland to attend him at Norham; and it was far from unusual in England to summon husbands to parliament in the right of their wives. See *Additional Case for the Countess of Sutherland*, page 81.

† Cap. 6. § ult.



voting upon lands which their wives do not enjoy as heiresses, or by the course of legal succession, but by singular titles or purchase, the courtesy not extending to these lands \*. It is not, however, so easy to determine whether the word *property* is here used in contradistinction to a bare right of superiority, or in opposition to a life-rent right in the wife that is to expire at her death: But it is understood in the latter sense. A husband may therefore vote upon his wife's infestment in a bare superiority, but cannot upon her life-rent, even though comprehending the *dominium utile* as well as the *dominium directum*.

The statute allows the same privilege to the widowers of heiresses, who are entitled to vote in right of the courtesy, which is a life-rent given by the act of the law, of all the lands in which the wife died infest, as heir to her predecessors.

Apprisers or adjudgers infest in lands, of the necessary extent or valuation, are also, by the same statute, entitled to be enrolled, and to vote in the election of a commissioner to parliament. This privilege, however, they enjoy not during the course of the legal reversion. Until it expire, their right is redeemable at any time when it shall please the debtor to pay the accumulated sum in the adjudication, and the interest, and may therefore be said to be pendent upon his will; whereas, upon the expiration of the time allowed to him for that purpose, his right to redeem the lands is foreclosed, and the legal transfer made by the adjudication becomes absolute; but where there are two or more adjudgers of the same lands, they cannot all be enrolled, or vote, how large soever the old extent, or valued rent of the lands may be. They are each of them proprietors of the whole *pro indiviso*; and the law allows the character of

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\* See February 1. 1681, Sir John Paterfon *contra* John Ord.



a freeholder to be assumed only by that adjudger who was first infest; and, in doing so, it even favours adjudgers more than voluntary disponees *pro indiviso*, none of whom can be enrolled till they obtain a division, how great soever the estate so conveyed to them in common may be \*. No adjudger can, however, be enrolled, even after the expiration of the legal reversion, unless he be in the possession of the lands; and, until that happen, the debtor is entitled to continue upon the roll †.

Proper wadsetters of lands, of the holding and of the extent, or valuation required by law, are, in like manner, entitled to be enrolled as freeholders; because, until the time of redemption come, they have the full enjoyment of the lands, as much as if they were absolute proprietors, and their right is nowise pendent on the will of the reverser. Improper wadsetters, on the other hand, are excluded, because they cannot be considered in the light of proprietors, even before the term of redemption. They are not entitled to the full rents and profits of the lands: They are bound to account for the surplus after payment of their interest, or, which is the same thing, to impute it in extinction of the capital sum due to them. Their situation is little better than that of those who have got heritable bonds or infestments for payment or security of money, and who are expressly excluded by the statute of the 12th of Queen Anne.

After the term of redemption is come, proper wadsetters are, in one respect, upon a similar footing with adjudgers before the expiration of the legal. The lands may be redeemed from them by the reverser at any subsequent term; and their right, from that time, is

\* See March 6. 1760, Sir Michael Stewart *contra* Captain Pollock, and the above mentioned resolution of the House of Commons, of the 23d January 1724.

† See June 7. 1748, Home Campbell, and Kerr, *contra* Home of Manderston.



is entirely pendent on his will; it may therefore be thought that such wadsetters ought not to be admitted to the roll, or, if formerly enrolled, ought then to be struck off. But as, in every question of this nature, the words of the statutes must be the governing rule, so the act 1681 appears to be adverse to such a plea; for it expressly enacted, 'that the rights to vote proceeding upon expired comprisings, adjudications, or proper wadsets, shall not be questionable upon pretence of any order of redemption, payment, and satisfaction, unless a decreet of declarator, or voluntary redemption, renunciation, or resignation, be produced.'

A wadset regularly implies a loan of money, for security of which, the lands, and the enjoyment of them, are pledged to the creditor. A disposition of lands, under a power to redeem them for a certain sum, without the intervention of a loan, real or assumed, is not a wadset, and, by the act of the 12th of Anne, gives no right to vote; and it was accordingly so found by the court of session \*. It is, however, sometimes difficult to distinguish between a wadset and a redeemable disposition. At the election of a representative for the county of Fife in 1776, Captain Dalrymple of Fordell claimed to be enrolled upon certain lands which had been conveyed to him by Mr Wemyss of Wemyss, redeemable at Whitsunday 1770, or any subsequent term of Whitsunday, by payment or consignment of L. 20 Sterling. The word *wadset* did not occur in the conveyance, but it bore as follows: 'Whereas Hugh Dalrymple of Fordell, Esquire, has made payment to me of the sum of L. 20 Sterling for my granting these presents, whereof I hereby grant the receipt, renouncing all exceptions and objections in the contrary; therefore, wit ye me to have fold, annailzied, (aliened), and disponed, as I by these presents sell, annailzie, and dispone, to and in favour of the said Hugh Dalrymple,

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rymple,

\* July 1. 1773, Sir James Colquhoun *contra* Hamilton of Hutcheson.



‘ rymple, his heirs and assignees, heritably, but redeemable always  
‘ and under reversion, in manner after mentioned, all and hail the  
‘ lands of Powguild, &c. ; providing always, as it is hereby expressly  
‘ agreed upon, that the lands, and others above disposed, shall be  
‘ redeemable by me, my heirs and successors, from the said Hugh  
‘ Dalrymple, and his foresaid, at the term of Whitsunday 1770  
‘ years, or at any other term of Whitsunday thereafter, by payment  
‘ making to them, or consignation for their behoof, of the sum of  
‘ L. 20 Sterling, upon premonition to be made to them forty days  
‘ preceding,’ &c. To this title it was objected, that it was not a  
wadset, but one of those redeemable rights that were reprobated by  
the act of Queen Anne; and, in support of this objection, it was  
observed, that a wadset being an impignoration of land, it must ap-  
pear from the instrument by which the land is conveyed, that it is a  
pledge, and that the reverser and wadsetter stand in the relation of  
debtor and creditor to each other; that, of course, it must be stated,  
either that the land is granted in wadset, or that it is conveyed in  
consequence of money lent, and as a security for the repayment;  
and that the deed of conveyance must either bear a clause of requi-  
sition, empowering the lender to redemand his money, or shew that  
it is competent to him to do so; but that the disposition to Captain  
Dalrymple was altogether in the form of a redeemable sale, and con-  
tained none of these essential requisites to the constitution of a wad-  
set. To this it was answered, that, to the constitution of a wadset,  
it was not necessary that there should be a borrower and a lender, a  
loan and a debt; that it might be created without any loan, and be  
granted as a security for a gratuitous gift; that, in former times, when  
money was scarce, it was the common mode of securing the por-  
tions of younger children; and that, although in many of the mo-  
dern precedents wadsets contained a clause of requisition, yet, in  
the earlier periods of the law of Scotland, no such clause was usual.  
A decision of the court of session, pronounced in 1754, in the case  
of



of Monro of Culcairn, where the conveyance bore the grant to be made for 'certain onerous causes and considerations,' without mentioning a single syllable respecting any loan or advance of money, or even making use of the words *wadset* or *pledge*, was also quoted on the part of the claimant; and the objection was accordingly repelled, not only by the majority of the freeholders, but by the court of session \*, and by a committee of the House of Commons, appointed to try the merits of the election of Mr Oswald, against whom a petition had been preferred by the present Sir John Henderson †.

It had, on former occasions, been objected, that the titles claimed on were not proper wadsets, because they contained no clause empowering those to whom they were granted to call for their money; but that objection was always over-ruled ‡. Such clauses are not indeed necessary to the constitution of wadsets; and, as was observed in the case of Captain Dalrymple, seem to be rather a modern invention. Of old, wadsetters generally got too beneficial bargains to think of parting with the possession of the lands, and calling back their money: And Craig, who, in his treatise *De Feudis*, wrote a whole title upon the subject of wadsets, takes no notice of a clause of that sort.

A wadset of the bare superiority of some lands, and of the full property of other lands, yielding a small rent, by which the wadsetter took the hazard both of the feu-duty and of the rent, was considered to be a proper wadset, and held sufficient to constitute a

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freehold

\* March 1776, *contra* Dalrymple.

† See Douglas's Controverted Elections, vol 4.

‡ July 18. 1745, Freeholders of Ross-shire *contra* Monro of Culcairn. January 17. 1755, Galbreath *contra* Cunningham.



freehold qualification, although it was objected, that, by the contract, the reverser was to have the benefit of the casualties of superiority, which might happen to become due before the redemption\*. The chief answer made to this objection was, that casualties of superiority are not the fruits of the lands, or a proper subject to be relied on for the payment of the interest of money; that the wadsetter trusted to the rents and feu-duties for payment of his interest; that, as he gave no consideration for the chance of casualties, it was but reasonable that he should account for them when they fell due; but still he was not, on that account, the less the proprietor of the lands; and that, in like manner, a superior may agree to gift, or discharge the casualties, and yet remain superior, and be entitled, as such, to a vote. It might also have been observed, that a vote upon a superiority had been sustained, although the superior had discharged the feu-duty for ever. So it was found, July 30. 1746, freeholders of Dumfries-shire *contra* Fergusson of Craigdarroch. At the same time, it may be doubted if the decision mentioned in the note was perfectly well founded. A superior may discharge the feu-duty for ever, and yet remain superior; but, were he to convey it to a third party, it might not be so clear that he could, with safety, take the oath of possession: And the same should seem to hold, even *a fortiori*, when he gives away the casualties of superiority. Indeed, in this particular case, the title upon which the vote was claimed, shewed that the casualties were reserved, and, on that account, the oath of possession might not be considered as a stumbling block in the way. Still, however, the complete right of superiority was not conveyed when the casualties were retained.

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\* March 6. 1754, Campbell of Succoth *contra* Stirling of Herbertshire.



A wadset of superiority, where the feu-duty was precisely equal to the legal interest of the redemption-money, was likewise found a proper wadset, so as to entitle to a vote\*.

Wadsetters cease to have a right to vote, and may, of consequence, be struck off the roll, as soon as a declarator of redemption, or a voluntary resignation, or even a renunciation, is obtained by the reverser: But as, by the wadsetter's infestment, he is constituted proprietor of the lands, and the reverser is divested of all right to them, other than the power of redemption, it is a question of some difficulty whether a simple renunciation by the wadsetter, though duly registered, can so far restore the reverser to his estate as to entitle him to be admitted to the roll of freeholders. As the law formerly stood, the superior was not bound to receive the reverser again as his vassal, even although the wadsetter had granted a disposition and a procuratory of resignation in his favour. To obviate this inconveniency, it was customary to obtain letters of regrefs from the superior, by which he became bound to give the reverser access to the property upon his redeeming the lands. That, however, is now unnecessary, the act of the 20th of George II. cap. 50. obliging all superiors, upon getting payment of the composition due to them on such occasions, to receive any one as their vassal who produces a grant by the former vassal, containing a procuratory of resignation. But still the difficulty remains, whether a bare renunciation, without a resignation in the hands of the superior, and a new charter and infestment following upon such resignation, can have the effect to restore the reverser to his former right. According to the nice notions of the feudal law, it cannot, and, consequently, should not entitle him to be admitted upon the freeholders roll. But, as the strict feudal rules have, of late years, been sometimes  
flighted

\* February 22. 1760, Grant of Drumphad, &c. *contra* Campbell.



slighted in questions of enrolment, a simple renunciation may, perhaps, some time or other, be held sufficient. A wadset, though seemingly a right of property, is, in reality, only a consideration for the use of money; and, viewing it in that light, it may be thought more consistent with justice and equity, that, after a renunciation, which is attended with little expence, the reverser should have the full benefit of his property\*. If, in any case, it shall be so decided, it should seem a necessary consequence, that the renunciation of the wadsetter need not be recorded a year before the reverser can claim to be enrolled; for a judgment holding a simple renunciation sufficient to entitle him to be enrolled, must proceed upon the footing of the wadset's operating only as a temporary disqualification. But, where a reverser adopts the more formal and expensive method of re-investing himself by obtaining a new charter upon the resignation of the wadsetter, it should seem that he cannot be enrolled till a year after the resignation of his investment upon such charter; for, in such a case, he appears in the light of a purchaser or singular successor. It is, however, rather inconsistent, that, in this respect, the reverser should be in a better situation, by accepting of a bare renunciation from the wadsetter, than if he had obtained a new charter of resignation. On that account, therefore, as well as on the feudal principles, the propriety of holding a renunciation to be sufficient to entitle the reverser to get upon the freeholders roll, may be doubted.

Although an investment has been classed as one of the essential qualifications respecting the title, yet it is not always necessary that the person who claims the right to vote be himself invest. We have  
already

\* This question occurred in 1767, in the case of Sir George Lockhart, but was not ultimately determined in the court of session, the parties having settled amicably.



already seen one instance of this, in the case of husbands who are entitled to vote in virtue of their wives infeftments. Another occurs in the case of apparent heirs, who, by the act 1681, are allowed the same privilege, if they are in possession, by virtue of their predecessor's infeftments, of lands of the holding and of the extent or valuation required by law.

The word *infeftment*, used in this part of the statute, is not, however, always to be confined merely to an instrument of seifine. The legislature thought it reasonable, that persons in a state of apparen- cy, should have the same right to vote which their predecessors enjoyed, without waiting till they made up the proper feudal titles in their own persons. But still it behoves them to show that their predecessors had a sufficient freehold qualification. That cannot be done by the production of an instrument of seifine alone, without its warrant. Such instruments make but a part of the title. They are only the bare assertions of a notary and the witnesses, and afford no right to lands without a proper warrant. It is, therefore, necessary that the charter or precept upon which they proceed be likewise produced, more especially as, if any legal objection lies to them, the seifine is of no avail. The act of the 16th George II. does, accordingly, speak with more precision upon this point, when it declares, in general terms, ' That no heir apparent shall be enrolled until his predecessor's *titles* are produced, and allowed by the freeholders as a sufficient qualification for his voting for a member of parliament.' Nor is this production the less necessary that the predecessor had himself stood upon the roll. It frequently happens, that, through inadvertency, persons are put upon the roll without a sufficient title; and although, after being once enrolled, they must continue for life, unless a challenge be brought within four kalendar months, or an alteration of their circumstances take place, it by no means follows that their apparent heirs must likewise be enrolled.



enrolled upon the same defective titles. At the general election in 1780, Moodie of Melfetter claimed to be enrolled a freeholder of the county of Orkney, as apparent heir of lands on which his father had stood on the roll for many years, and to whose qualification, it was notorious, no objection lay; but, having produced only his father's instrument of seifine, without its warrant, the freeholders rejected his claim, and their judgment was affirmed in the court of session\*. The claim of another gentleman, Traill of Holland, was set aside by the court of session, although he produced the necessary titles, and although both his father and grandfather had been enrolled upon the same lands, because there appeared a defect in the proof of his having the valuation required by law†.

From this general rule, that the production of an instrument of seifine alone, without its warrant, is not sufficient to entitle an apparent heir to be admitted to the roll, there is, however, one exception. By an act of the Scottish parliament, 1594, cap. 218. it was declared, that, after the lapse of forty years, the want of a precept, issued by the chancery in consequence of a retour on a brieve of mortancestry, should be no cause of reduction, *or of any quarrel whatsoever*. An instrument of seifine, bearing to have proceeded upon a precept of that sort, is, therefore, itself, a sufficient title after the lapse of forty years; and, of course, the heir apparent of a person who has possessed in virtue of such a seifine for that period, is under no obligation to produce the precept upon which it is produced. It is not a necessary link in his titles. The want of it creates no defect in his right to the lands, or to the enjoyment of any privilege to which they would otherwise entitle him.

\* February 10. 1781, Moodie *contra* Baikie.

† February 10. 1781, Haldane *contra* Traill of Holland.



him. The predecessor, if not formerly upon the roll, must have been admitted to it upon production of the seifine alone, after the lapse of forty years, and the titles that would have afforded a freehold qualification to him, must be equally available in that, as in other respects, to his heir. So it was decided in the before mentioned case of Mr Traill of Holland.

Neither the act 1681, nor the statute of the 16th of George II. distinguishes whether the predecessor stood on the roll or not; it is sufficient that his titles were such as to give him a right to be enrolled: That, however, is absolutely necessary: And hence it must follow that, if he has died within less than a year from the registration of his infeftment in lands acquired by himself, and not transmitted to him by succession, his heir apparent must wait the expiration of that year before he can enter his claim; for it never could be the intention of the legislature to put apparent heirs upon a better footing than their predecessors, who were actually infeft.

Sir George M'Kenzie observes\*, that a person claiming right to the estate of his grandfather, by the mother's side, cannot be enrolled until he be actually served heir; because it is, in law, presumed that there is an heir-male, until the contrary be proved by a service. The propriety of this exception, for which there is no foundation in the words of the statute 1681, may, however, be doubted. It should rather appear to be sufficient, that the right of apparency was known to the freeholders, whether the succession flowed from a paternal or a maternal relation. At any rate, there is no necessity for an infeftment, the service itself affording sufficient evidence of the claimant's being the nearest heir.

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\* Observations, pag. 468.



An apparent heir was found entitled to be enrolled, although his predecessor had executed a disposition of the lands, with a procuratory and precept, in favour of a third party, the disponee having, for a sum paid, granted an obligation not to become the crown's vassal, by taking an investiture on the procuratory, or obtaining a charter of confirmation during the life of the apparent heir\*. But, where the predecessor's right is of a revocable nature, the granting a discharge of the power of revocation to the heir will not entitle him to be enrolled upon his apparency†. The apparent heir can only be enrolled, as such, upon a title that would have afforded a good qualification in the predecessor; but the predecessor could not have been enrolled upon a revocable disposition, and the discharge is a new title granted to the heir himself.

It is no objection to an heir's being immediately enrolled, that he has made up titles to the lands in his own person‡. The privilege is not given to heirs, because they are in a state of apparency, but because it is reasonable, that, when the succession opens to them, they should have the same right to vote which their predecessors enjoyed, although they have not completed their feudal titles. It would, therefore, be inconsistent to put them upon a worse footing on account of their having made up such titles, by postponing their enrolment till a year after the registration of their investitures.

#### Husbands

\* March 5. 1755, Murray *contra* Neilson. The obligation was not recorded; but no objection was made on that account. See the case of Fergusson of Auchinsoul, to be mentioned in the sequel.

† March 3. 1753, Abercrombie *contra* Gordon.

‡ January 17. 1755, Galbraith *contra* Cunningham.



Husbands cannot vote upon the apparency of their wives; and are only entitled to that privilege when the wife is infest\*. But it is not necessary for the husband to wait a year after her infestment before he can be enrolled†.

It may be asked, whether one who wants to be enrolled as an apparent heir must lodge a claim with the sheriff-clerk two kalendar months before the Michaelmas meeting? That point has never been precisely decided; but, from a judgment pronounced in a late case, it appears to have been the opinion of the court of session that a claim was necessary. In that case, an apparent heir had actually lodged a claim, and was accordingly enrolled: And a complaint having been preferred, in which it was stated, that the claim was defective, in respect that it neither mentioned the dates of the predecessor's titles, nor the particular lands upon which the claimant desired to be enrolled, nor their extent or valuation, the court sustained the objection, and ordered him to be struck off the roll‡. But, if a claim had been unnecessary, it must have been a matter of no consequence that the apparent heir had lodged one that was defective. Indeed, the words of the act of the 16th of George II. which orders claims to be lodged so long before-hand, for the purpose of preventing surprise, are general. The statute makes no exception with regard to apparent heirs more than others who apply to be admitted to the roll. And, as it is not necessary to the enrolment of an apparent heir, that his predecessor should have stood upon the roll, it is equally reasonable that the freeholders have time

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\* 12mo Annae, C. 6. § ult. January 19. 1745, freeholders of Lanarkshire *contra* Hamilton of Wifhaw.

† March 7. 1781, Dalrymple and Bremner *contra* Farquhar Gray.

‡ March 3. 1773, Gordon *contra* Abernethy of Mayen.



to examine into the titles to be produced by apparent heirs, as to investigate those to be founded on by singular successors.

When it is in view to establish a freehold qualification upon a bare superiority, the claimant must be able to shew that he has a proper feudal vassal in the lands. It has, accordingly, been determined, that a disposition of lands, containing an assignation to a charter, but reserving the property, or *dominium utile*, to the granter of such disposition, does not afford a title for enrolment\*. A subaltern holding cannot be established in that manner by a simple reservation; and when a person intends to part with the superiority of his lands, in order to give a freehold qualification to another, the best method is to separate the property from the superiority beforehand, by granting a feu-right to a third party, and then to execute a disposition of the lands to the person who is to get the qualification, with an exception of that feu-right from the warrandice (warranty), after which the disponent needs only a re-conveyance from the third party, to whom the feu was given, to vest the property, or *dominium utile*, in his own person†.

The last qualification, so far as it relates to the title, is, that the claimant be actually in possession of the lands. This is a most salutary regulation to prevent fictitious freeholds being reared upon  
simulate

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1759, *Elliot contra Shaw and Oliver*.

† When an estate is to be split into a number of parts for the purpose of establishing as many freehold qualifications, the conveyancer ought to be attentive in order to prevent doubts and questions with regard to undivided feu or blench duties. The mode adopted by Earl Panmure, above taken notice of, was exceedingly cautious; for as many feus were granted as freehold qualifications were intended. That, however, must have been attended with a very considerable expence. See another method in the report of the case, January 9. 1755, *Forrester contra Fletcher*. The feu-right may declare, *in graemio*, its own purpose, and that the feuer is bound to reconvey.



simulate titles in persons who have no real interest in the estate, in virtue of which they claim a right to vote; and, in order to carry it into execution, the utmost attention on the part of the legislature has been requisite.

The act of the 12th of Anne, cap. 6. after observing, that, of late, several conveyances of estates had been made, in trust, or redeemable for elusory sums, nowise adequate to the true value of the lands, on purpose to create and multiply votes, contrary to the true intent and meaning of the laws in that behalf, did, therefore, *inter alia*, enact, That, from and after the termination of the then parliament, it should be lawful to any one of the electors present at a meeting for election, who suspected any persons to hold their estates in trust, and for the behoof of others, to require the preses of the meeting to put to such persons the following oath; and that those who refused to swear and subscribe such oath should be incapable of voting, or of being elected at that meeting. The oath runs thus: ‘ I *A. B.* do, in the presence of God, declare and ‘ swear, that the lands and estate of \_\_\_\_\_ for which I claim ‘ to give my vote in this election, are not conveyed to me in trust, ‘ or for the behoof of any other person whatsoever: And I do swear, ‘ before God, that neither I, nor any person, to my knowledge, ‘ in my name, or by my allowance, hath given, or intends to give, ‘ any promise, obligation, bond, back-bond, or other security, for ‘ re-disposing or re-conveying the said lands and estate, any man- ‘ ner of way whatsoever. And this is truth, as I shall answer to ‘ God.’

This oath, not being thought sufficiently comprehensive to guard against the evil the legislature had it in view to prevent, the following was substituted in its place, by an act of the 7th of George II. cap. 16. ‘ I *A. B.* do, in the presence of God, declare and swear,  
‘ That



‘ That the lands and estate of \_\_\_\_\_ for which I claim a  
‘ right to vote in the election of a member to serve in parliament  
‘ for this county, or stewartry, is actually in my possession, and do  
‘ really and truly belong to me, and is my own proper estate, and  
‘ is not conveyed to me in trust, or for, or in behalf of any other  
‘ person whatsoever; and that neither I, nor any person, to my  
‘ knowledge, in my name, or on my account, or by my allowance,  
‘ hath given, or intends to give, any promise, obligation, bond,  
‘ back-bond, or other security whatsoever, other than appears from  
‘ the tenor and contents of the title upon which I now claim a right  
‘ to vote, directly or indirectly, for re-disponing and re-conveying  
‘ the said lands and estate, in any manner of way whatsoever, or  
‘ for making the rents or profits thereof forthcoming to the use or  
‘ benefit of the person from whom I have acquired the said estate,  
‘ or any other person whatsoever; and that my title to the said  
‘ lands and estate is not nominal or fictitious, created or reserved in  
‘ me in order to enable me to vote for a member to serve in par-  
‘ liament, but that the same is a true and real estate in me, for my  
‘ own use and benefit, and for the use of no other person whatso-  
‘ ever. And that is the truth, as I shall answer to God.’

The statute appoints this oath to be taken, when required, ‘ by  
‘ every freeholder who shall claim to vote at any election of a mem-  
‘ ber to serve in parliament for any lands or estate, in any county  
‘ or stewartry in Scotland, or who shall have right to vote in ad-  
‘ justing the rolls of freeholders, &c. before he proceed to vote in  
‘ the choice of a member, or on adjusting the rolls.’ And it fur-  
‘ ther enacts, ‘ That, in case he shall refuse, if required, to take and  
‘ subscribe the oath aforesaid, his vote shall not be admitted or al-  
‘ lowed, and his name shall forthwith be erased out of the roll of  
‘ freeholders: And in case any person shall presume, wilfully and  
‘ falsely to swear and subscribe the said oath, and shall be thereof  
‘ lawfully



‘lawfully convicted, he shall incur the pains and punishment of  
‘perjury, and be prosecuted for the same, according to the laws  
‘and forms in use in Scotland\*.’

At the meeting of the freeholders of the shire of Ayr, held for electing their representative to the last parliament, Mungo Campbell, who had been enrolled the year before, voted in the choice of preses and clerk; but, before any other business was begun, or any question stated that could give occasion to a vote, he was called upon to take the above recited oath; upon which, without saying any thing, he slipped out, and withdrew from the meeting. The freeholder who had required him to take the oath, insisted that his name should be erased from the roll; but the majority of the meeting refused to do so. A complaint was next preferred to the court of session; and, although Mr Campbell, in his answer, contended that the oath could not be put till he was *proceeding to give a vote*, and that his going out of the court upon its being put to him at a time when no question was before the meeting, could not, upon a sound construction of the statute, be interpreted a refusal to take it, the court found, ‘That the respondent having wilfully absented himself after the trust oath was desired to be put, is to be held as refusing to take the oath: Therefore, found the freeholders of the  
‘county of Ayr did wrong in refusing to expunge the name of the  
‘said Mungo Campbell respondent from the roll of freeholders of  
‘said county, and granted warrant to, and ordained the sheriff-  
‘clerk of the said county of Ayr, forthwith to expunge the name  
‘of the said respondent from the said roll.’ The court likewise condemned Mr Campbell in costs, which they taxed to L. 5, and the expence of extracting the warrant†.

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\* The act appoints this oath to be extended on parchment, and the tenor of it shews that a separate copy must be made out for every person by whom it is taken.

† December 9. 1780, Fergusson *contra* Campbell.



By the same statute, it was appointed, that every freeholder, before he is either enrolled, or admitted to vote at an election or meeting for enrolment, in any question for the choice of a preses or clerk, or other question whatsoever, shall be obliged, (if required by any other freeholder present), to take and subscribe the oaths appointed by law to be taken by electors of members to serve in parliament, when required so to do, which oath the preses or clerk of the meeting is impowered and required to administer. It has been made a question, whether this part of the statute, allowing oaths to be put before the election of preses and clerk, relates solely to the oaths to government? or whether it likewise comprehends the oath of trust or possession first introduced by the act of the 12th of Queen Anne, and amended by this act of George II.? At the election of a representative for the shire of Aberdeen in 1734, a motion was made to put it before choosing the preses and clerk, but that motion was over-ruled. In 1764, it was put to, and taken by several of the freeholders of the shire of Perth; but one of them having declined it, the matter was not pushed further at that meeting. In the course of the complaints that followed the election for the shire of Cromarty in 1768, an inquiry was made into the practice; and reports were obtained from about twenty different counties, that it was not customary to put it till after the election of the preses and clerk. At last the point came to be solemnly tried in the course of certain complaints from the shire of Murray, where this oath had been tendered, but was refused to be taken before the election of preses and clerk, at the Michaelmas meeting 1772. The court of session found, that the oath was lawfully tendered at that meeting\*. But the House of Lords reversed the decree, and found that it could not be put†.

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\* February 24. 1773, Sir Ludovick Grant, and others, *contra* Archibald Duff.

† March 31. 1773. This seems to merit the attention of the legislature. It often



The oath bears, that the lands on which the claim to vote is rested, are actually in the possession of the claimant; but corporal possession, or what, in opposition to *civil*, is termed *natural* possession, is not necessary. The word must be here interpreted according to its legal sense. Thus, the possession of a liferenter is held to be possession by the fiar; and the possession of adjudgers, before the expiration of the legal reversion, is understood to be possession by the owner. Even the right to possess, though not actually carried into execution, is sufficient. A decree of mails and duties, or a poinding of the ground, (two modes of forcing payment of rents or feu-duties), affords legal possession, although nothing be hitherto uplifted. Indeed, blench duties, such as a peacock's feather, a pair of spurs, or a penny, *si petatur tantum*, are seldom, if ever, demanded from vassals; but still the superiors are legally in possession, and in safety to take the oath. They may do so, even although they have discharged the feu-duty for ever. It is enough that they remain superiors. It is not any pecuniary benefit they may reap, or be entitled to reap, that gives them a right to vote. It is the Lordship, or superiority, that gives that right; and, as long as it remains substantially and truly with them, they are in safety to take the oath; the possession of their vassals being, in the eye of law, their own possession.

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ten happens that the party which carries the question in the choice of the preses, does thereby carry the election; and, it seems unjust, that those who, by reason of their not being able to take the trust oath, cannot vote directly in the election of a member, should be allowed to do so indirectly by voting for a preses, whose decisive or casting vote may give the election to the person whose interest they want to support. The allowing the oaths to government to be put before the election of the preses, was calculated to prevent the disaffected from having it in their power to decide the fate of an election: And it is equally reasonable, that those who have no real estate, and, on that account, cannot, with a safe conscience, take the trust oath, should likewise be deprived of that power.



The words 'nominal or fictitious, created or reserved, in order to enable to vote for a member to serve in parliament,' have been productive of many questions; and the court of session, from a laudable anxiety to carry into effect what appeared to them to be the intention of the legislature, perhaps went farther some years ago, than, as mere interpreters of statutes, they had authority to do.

The first instance I find of this objection being stated against a title, occurred in 1745, in the case of Burnet of Crigie. That gentleman received a disposition of certain lands from his father, to whom he afterwards granted a charter of the same lands, to be held blench of himself. The freeholders objected to his claim to be enrolled, that he had no real estate, and that his title was manifestly collusive and nominal, or fictitious, created in order to make a vote. But it being answered, that a bare superiority was a good title, and that the son's interest, of how little value soever it might be, was real, and not held for the behoof of any other person, the court of session repelled the objection \*.

The question being, however, again brought under consideration, by a reclaiming petition, in which it was chiefly urged, that it behoved the claimer of a vote to swear that he had not made any disposition of the lands, or rents, other than appeared from the contents of the titles under which he claimed, the court altered their first interlocutor, and sustained the objection †. This ultimate judgment of the court appears, therefore, not to have proceeded upon the objection of nominal and fictitious, but upon the former part of the oath of trust, relative to redispensing, or reconveying the estate, or making the rents or profits forthcoming to the use or benefit of the person.

\* July 31. 1745, the freeholders of Kincardineshire *contra* Burnet of Crigie.

† June 19. 1746.



person from whom it was acquired \*. Had the conveyance to the son contained an obligation upon him to redispone the property, or *dominium utile*, to the father, there would have been no room for the objection. It was, indeed, objected in 1755, to the titles produced for three several claimants, that they were nominal and fictitious, because the dispositions upon which their charters proceeded contained a proviso, that, as soon as they had completed their rights to the lands, as immediate vassals of the crown, they should reconvey the property to be held feu of themselves for a small feuduty, and that the casualties of the superiority should be taxed to small elusory sums. But as, in that case, there was no obligation upon these claimants other than what appeared from their own titles, and it could not be disputed that a bare superiority gave a good right to vote, the court of session repelled the objection †.

In 1757, the Earl of Glencairn conveyed the superiority of certain lands to Mr Porterfield, who was the vassal in these lands. Mr Porterfield obtained a charter upon the procuratory of resignation contained in the disposition, and, without taking infeftment in his own name, immediately conveyed two parcels of the lands to two of the Earl's nephews in liferent, and to the Earl himself in fee. These two liferenters being infeft, and having claimed to be enrolled, it was objected, that their titles were plainly nominal and fictitious. But it being answered, that each of them had a true and real estate; that they were under no promise or back-bond, and held their superiorities in trust for no person whatever; and that it was no objection to a claimant, that his chief view in purchasing the right under which he claims was to entitle him to the valuable privilege of voting for a member to serve in parliament, unless it could likewise

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\* See this Case as stated in the Remarkable Decisions, No. 75.

† January 9. 1755, Forrester and others *contra* Fletcher and others.



be proved that his right was nominal and fictitious, *i. e.* not a real and true estate in himself, but held in trust for some other person, the court repelled the objection \*. A similar judgment was pronounced in the course of the same month †, in the case of Grant of Drumphad, where it was contended, that, from the very manner in which the titles were made up, it was plain that the claimant had acquired the estate, not for his own behoof, but to serve the granter; and that, as the law reprobated all such nominal votes, so, if the court were satisfied from the face of the deeds, and from the nature of the transaction, that the claimant's titles came under that description, it was the same thing as if he had acknowledged upon oath, that his qualification was nominal and fictitious. A still stronger case

\* February 5. 1760, Campbell of Shawfield and Graham of Gartmore *contra* Muir of Caldwell. Those who do not consider the view of the legislature in introducing the trust oath, and take every part of it separately, are apt to think, that no man can subscribe it, with a safe conscience, who purchases a superiority for the sole purpose of entitling him to vote in the election of a member to serve in parliament. They are, however, too scrupulous. From the preamble of the act of Queen Anne, we may plainly perceive, that no more was intended than to put a check to the practice of giving estates in trust, or redeemable for elusory sums, on purpose to create and multiply votes; and, although the oath prescribed by the subsequent act of the 7th of George II. is more minute and particular, we have no reason to think that any thing farther was then intended. It is not to be supposed that the legislature could mean to prevent people from purchasing superiorities for the purpose of acquiring freehold qualifications; all they had in view was to restrain the creating of nominal and fictitious estates for that purpose; and the conclusion of the oath, which gives the description of a good qualification, in opposition to one that was meant to be reprobated, shows, that no more is requisite than that the estate, such as it is, be a true and real estate in the freeholder, for his own use and benefit, and for the use of no other person. The decision here quoted gives therefore a just interpretation of that oath. It has accordingly been held sufficient to entitle a purchaser to a diminution of the price, that the lands sold to him were erroneously said, at the time of the bargain, to afford a freehold qualification. See June 23. 1757, M'Lean *contra* M'Neil.

† February 22. 1760.



case occurred in 1761 \*; but, although it was observed from the bench, that the title conveyed no real interest in land, the claimant being only entitled to receive from his vassal one penny Scots of blench duty yearly, yet, as it had been decided in the other cases, that no regard was to be paid to the value of the estate, provided the claimant was really and truly vested in the right of superiority, the court repelled the objection.

But, in the course of the questions that arose with regard to many freehold qualifications, made up in the view of the general election which happened in 1768, the court of session took rather a different turn. Influenced by the words of the trust oath, above taken notice of, viz. that the estate on which the freehold is claimed is not nominal or fictitious, created or reserved in order to enable to vote for a member of parliament, they laid hold of every circumstance, arising either from the face of the deeds, or from the acknowledgement of parties, which tended in the least to show, that the titles of the claimants had not been executed with a view to grant them a real estate for their own use and benefit, but merely in order to enable them to vote; and, upon that footing, they not only dismissed the complaints of many whom the freeholders had refused to admit upon the roll, though on other grounds, but also ordered a number of others to be struck off who had been actually enrolled, without any such objection being moved against them in the meeting of the freeholders; and, although complaints which had been brought against the enrolment of some of those persons, upon other grounds, had been dismissed by interlocutors that were suffered to become final, yet, where the decrees were not extracted, they considered them as still in dependence, and, upon a wakening of such of them as were

\* July 28. 1761, Stewart and others *contra* Dalrymple and others.



were sleeping \*, allowed the objection to be received; nay, farther, they even ordered those who had taken the trust oath in the meetings of the freeholders, to answer special interrogatories, for the purpose of discovering whether their qualifications were nominal and fictitious, or created on purpose to enable them to vote, and, upon their refusing to answer, held them to have confessed these interrogatories, and ordered them to be struck off the roll.

To mention all the cases of this kind that were determined by the court of session would fill a large volume. The most common method of giving freehold qualifications then practised, was by grants of liferents or wadsets; and it will suffice to give an instance from each.

David Wallace, merchant in Aberbrothock, claimed to be enrolled at the Michaelmas meeting of freeholders of the county of Forfar held in 1767, as being infeft in the liferent of the superiority of certain lands, in consequence of a conveyance from Earl Panmure, and an assignment to the precept of feifine in his Lordship's crown charter, so far as it related to these lands. The feu-duties payable by the vassal (the Earl's brother) amounted only to sixpence, and two thirds of a penny yearly; and it having been required by some of the freeholders present at the meeting, that this claimant should take the trust oath prescribed by the act of the 7th of George II. he complied with that request, and was thereupon enrolled. Against this enrolment a complaint was preferred, in the course of which it was objected, that the claimant's qualification was nominal and fictitious, and, for proof thereof, the complainer referred to his

\* A suit before the court of session is said to be sleeping, when no step of judicial procedure has been taken in it for a twelvemonth; after which, it cannot again be proceeded in without first executing a summons of waking or revivor.



his own oath the following particulars: *1mo*, That it had been transacted between him and Lord Panmure, that he should accept of the liferent, for the single purpose of creating a vote, in order to support his Lordship's interest at the ensuing election. *2do*, That at, or soon after obtaining the conveyance, he had granted a back-bond, missive, or some other security in writing, obliging himself to denude in his Lordship's favour when required. *3tio*, That he paid no value for the conveyance granted to him. *4to*, That he received no revenue or profit of any kind in consequence of that conveyance. *5to*, That it had been made out at the expence of Earl Panmure, the granter; that the claimant neither had bestowed, nor intended to bestow, any expence, in order to render it effectual; that the titles never had been so much as delivered to him; and that he took no concern in the complaint then depending against him. And, *6to*, That he understood himself to be bound in conscience, and as an honest man, to renounce his liferent at any time Lord Panmure should ask it of him.

Upon the part of Mr Wallace, it was objected, that, having taken the oath which the law had prescribed as the test of a real freehold qualification, no other oath could be put to him, or other mode of investigation be followed; nor could he be afterwards bound to answer interrogatories, in consequence of which he might be indicted for perjury; and that the court of session being only a court of review, in questions of enrolment, could not take under their consideration evidence which had not been laid before the freeholders, and far less administer any oath which the freeholders could not administer. To this it was answered, that although, by the oath prescribed in the act of George II. a new and summary method of discovering fictitious qualifications, without the necessity of resorting to tedious and expensive proceedings at law, was introduced, yet the statute did not mean to enact that it should be the only mode of investigation,



investigation, or to take away the rules of proceeding by special interrogatories; that it could not be considered as an oath of reference to a party upon a matter of fact, but was an oath merely of opinion, and, therefore, no answer that might be made to the interrogatories could ever infer the crime or penalties of perjury; that although it might be doubtful how far the freeholders, whose powers were derived from particular and express statutes, could put such special interrogatories; yet, as it was clearly the intention of the legislature to put an end to all nominal and fictitious qualifications, so, whenever the powers given to inferior courts were defective, it was necessary to have recourse to the court of session, whose jurisdiction was ample and extensive; and that the questions proposed to be put tended to fix certain positions in law, of which that court were the only judges.

The court found it competent to demand the oath upon these interrogatories; and Mr Wallace having declined to answer, they held him as confessed upon the points so referred to his oath, and found, that the estate upon which he had been enrolled was not a real estate in his person, for his own use and benefit, but that his rights and titles thereto were nominal and fictitious, created in order to entitle him to vote at the ensuing election, and therefore ordered his name to be struck out of the roll \*.

Mr Rofs of Inverchassy was enrolled as a freeholder of the county of Cromarty at the Michaelmas meeting 1766, upon a wadset of a superiority that entitled him only to a feu-duty of L. 5 : 10 : 0 Scots, and was redeemable at Whitsunday 1769, upon payment of L. 180 Scots.

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\* March 9. 1768, George Skene and others *contra* David Wallace.



A complaint was preferred against this enrolment; and, after certain objections had been over-ruled, it was pleaded, that Mr Ross's title was altogether nominal and fictitious in the construction of law; and, in support of this plea, the following facts were offered to be proved by his oath: *1mo*, That he was solicited by Mr Pulteney (one of the candidates) to accept of the wadset, in order to create in him a freehold qualification; and that, as the sole purpose of it was to entitle him to vote for that gentleman at the ensuing election, so he understood that it was given with that view. *2do*, That he had no previous treaty with M'Leod of Cadboll, (the granter of the wadset), either with respect to the particular lands to be wadsetted to him, or with regard to the wadset sum, or the term of redemption. *3tio*, That he neither paid, nor gave security for the wadset sum, or, if any security had been granted, it was previously concerted, or at least he was given to understand, that no demand was to be made upon him either for principal or interest; and that, upon his renouncing the wadset, such security was to be delivered up. *4to*, That the expence of making out the conveyance, and of his infeftment, was defrayed by Mr Pulteney, or others by his orders; and that these title deeds never were delivered to Mr Ross. And, *lastly*, That the expence of defending against the complaint was likewise defrayed by Mr Pulteney, by whose agents the whole was managed; and that Mr Ross neither had paid, nor considered himself as liable in payment, of any part of that expence.

It was also farther objected, that Mr Ross's title could not be considered as a wadset; that a wadset was defined to be 'a right, by which lands, or other heritable subjects, were impignorated by the proprietor to his creditor in security of his debt;' that this description did not apply when no money was advanced at the time of receiving the right, as, in that case, there could be no impignoration; and, therefore, laying the objection of nominal and fictitious



out of the question, there was here a separate objection, that Mr Rofs was not a proper wadsetter in terms of the act 1681. Upon this, however, no stress was laid. A wadset right may be given without any money, or other consideration, being paid to the granter, and the wadsetter becomes nevertheless a creditor in the eye of law. It was, indeed, in ancient times, customary to grant wadsets of parts of an estate to younger children, as a security for such provisions as their father chose to settle upon them.

Mr Rofs was ordered to depose upon the facts referred to his oath, but declined to do so, upon which the court pronounced an interlocutor similar to that in the case of Wallace above mentioned.

I have chosen these two instances out of many of a similar nature, because, in both, the decrees of the Court of Session were reversed in the House of Lords\*; and the reader may have an opportunity of looking into the printed cases. It is not to be supposed that the Court of Session will again follow the same mode of procedure; and, therefore, until some new regulation be introduced by the legislature, there can be no check against nominal and fictitious qualifications, created or reserved to serve a particular purpose, other than the oath prescribed by the act of the 7th of George II. which must be put upon the request of any freeholder present, either at a Michaelmas meeting, or at a meeting for election.

## CHAPTER

\* May 9. 1770. Another reversal took place the same day, in the case of John Johnston, Esq; who, after answering special interrogatories put to him in the court of session, was ordered to be struck off the roll, that court having found it proved, that his estate was not a real estate in his person, for his own use and benefit, but that his rights and titles thereto were nominal and fictitious, created in order to enable him to vote at the ensuing election.



## CHAPTER III.

*Of certain Circumstances, independent of the Title, which disable persons from being admitted upon the Freeholders Roll, or from voting in the election of Commissioners from Shires.*

**H**AVING stated the qualifications required by law to entitle a person to be admitted to the freeholders roll, so far as respects the title upon which the claim for enrolment is founded, it comes next to be considered, whether there are any other requisites, and what circumstances will disable those who are infest, and in possession of lands of forty shillings of old extent, or of L. 400 of valued rent, holding of the King or Prince, from being put upon the roll, or from the privilege of voting, although already admitted to it.

It is, in the *first* place, necessary, that those who claim to be admitted to the roll be of full age. Minority is mentioned in the act 1681 as a sufficient objection to a person's voting in an election; and it is also declared by the statute 1707, cap. 8. that none shall be capable to elect, or to be elected, but such as are twenty-one years of age complete. Neither of these statutes does, however, expressly prohibit a minor from being enrolled. Hence, at the Michaelmas meeting of the freeholders of the county of Cromarty in 1768, Mr Gordon of Newhall, who then wanted a few months of twenty-one



years, was enrolled, under a proviso that he should not be entitled to vote in any question until he should be of perfect age: But, upon a complaint to the court of session, he was ordered to be struck off the roll, although he had, in the mean time, become of age before the complaint was determined \*. This was a proper decision: For, although we have seen instances of objections, apparently well founded, at the meeting of freeholders, allowed to be removed by collateral or explanatory evidence, produced for the first time before the court of session, it does not follow that Mr Gordon's becoming major before the issue of the complaint ought to have produced a similar effect, and to have induced the court to continue him upon the roll. In these cases the title was good when the claim was presented to the freeholders, although not sufficiently established; but in the case of Mr Gordon there was an evident defect; and it might with equal reason be maintained, that a person who had been erroneously enrolled, within less than a year after the registration of his seifine, should be continued upon the roll, because the year has elapsed during the pendency of a complaint brought against his enrolment. Although a minor should, through inadvertency or favour, be enrolled, it will still be competent, under the authority of the statutes, to object to his capacity to vote or to be elected.

It has already been observed, that one under tutory, or guardianship, as fatuous or lunatic, cannot be entitled to vote in the election of a peer; and, in like manner, persons in that unhappy situation cannot be enrolled as freeholders. There seems to be no sufficient reason, however, for excluding from that privilege persons who are under an interdiction either legal or voluntary †; and although, by a special statute,

\* December 1765, M'Leod of Cadboll *contra* Gordon of Newhall.

† An interdiction is a form in the law of Scotland, by which persons, who though so weak



statute, those who have obtained protections from the diligence of creditors are excluded, during the currency of such protections, from voting in the election of a member of parliament, there is no such enactment against persons who are interdicted \*.

Papists are also expressly excluded from the right of voting, and therefore ought not to be admitted to the roll; and if any person who stands upon it shall refuse to take the formula prescribed by the act of King William, as above inserted, he thereby becomes incapable to elect or to be elected †.

The eldest sons of peers, although infest in lands holding of the crown, of the extent or valuation prescribed by law, are likewise incapable of electing, or of being elected, and therefore cannot be admitted to the roll. For this Spottiswood ‡ assigns the following reason:

weak as not to be trusted with the total management of their affairs, yet are not in a situation to be found lunatic, may be restrained from disposing of their heritage without the consent of certain persons, who are termed their interdictors. A legal interdiction is an act of the court of session, pronounced after taking cognisance of the person's situation. A voluntary interdiction is a private act of the person himself, who, sensible of his own weakness or profusion, grants a bond, by which he restrains himself from disposing of his heritage without the consent of certain friends therein named.

\* See, however, upon this point, Spottiswood's Law of Elections, page 44.

† 1707, cap. 8. It may be doubted, however, if the freeholders can strike a person off the roll upon his refusing to take the formula. No such power is given by the statute; and it may be thought a sufficient security, that this test of his religious profession can be put to him every time he attends and claims to vote. In like manner, those who refuse to take the oath of abjuration, when it is tendered to them, are disabled from voting, but they cannot, on that account, be struck off the roll. A different rule, indeed, takes place when one refuses to take the trust oath prescribed by the act of the 7th of George II; for such refusal clearly implies an acknowledgement of a defect in his title.

‡ Page 49.



reason: 'That they are *quasi* peers of the realm, and have a precedence allotted to them; that, by their birth, they enjoyed a privilege to sit in the parliament of Scotland, and to hear the transactions in the meetings of the estates of the kingdom, in order to fit them for being worthy members of that august assembly, when, upon their fathers death, they should sit in their bench; and that, in ancient times, they were allowed to sit and vote in parliament as proxies for peers.' But although, for a long time before the union, the eldest sons of peers were not allowed to sit in the parliament of Scotland as representatives either of shires or of boroughs, the records afford the most complete evidence, that, in more ancient times, and before the representation of counties came to be thoroughly established, they sat in the same parliaments in which their fathers attended as peers. Instances of this are to be found in the parliaments 1478, 1481, and 1484; and in the list of the parliament 1560, given in Keith's history, page 146. we find William Master of Marishal, John Master of Maxwell of Terriglis, Patrick Master of Lindesay, Henry Master of Sinclair, and William Master of Glencairn \*. Perhaps they sat on these occasions in virtue of their happening to be possessed of landed property; and although we meet with no explicit enactment of the legislature abolishing this practice, no instances of its being continued after the last mentioned period are to be found in the records. It is also certain, that, for a considerable time before the union, the eldest sons of peers were understood to be incapable of representing either counties or boroughs; and, as the act 1707, cap. 8. declared that none should be capable to elect, or to be elected, as representatives of shires or boroughs in Scotland, but those who were entitled to that privilege by the laws

\* In those days, the eldest sons both of Earls and Lords were termed Master. The Master of Glencairn was the eldest son of the Earl of Glencairn. That term, though now it seems to be almost entirely laid aside, continued to be applied to the eldest sons of Lords till a few years ago.



laws and constitution of Scotland, they were thereby effectually debarred from having any voice in the election of the forty-five commoners to be returned from that part of the united kingdom to the British parliament; and a declaration to that effect was accordingly made by a resolution of the House of Commons, in the parliament of Great Britain held in the year 1708 \*. They may, however,

\* Two resolutions of the parliament of Scotland upon this point are extant in the records. The first is as follows: 'Edinburgh, the 23d of April, 1685. In respect the Viscount of Tarbet's eldest son, elected one of the commissioners for the shire of Ross, by reason that his father is nobilitate, cannot now represent that shire, warrant was given to the freeholders of that shire to meet and elect another person in his place.' The other respected a seat for a borough, and is thus expressed: 'Edinburgh, 18th March 1689. The meeting of the estates having heard the report of the committee for elections, bearing, that, in the controverted election for the borough of Linlithgow, in favour of the Lord Livingston and William Higgens, it is the opinion of the committee that William Higgens's commission ought to be preferred, *first*, in regard of the Lord Livingston's incapacity to represent a borough, being the eldest son of a peer; *secondly*, in respect William Higgens was more legally and formally elected by the plurality of votes of the burgeses, they have approved, and approves, the said report in both the heads thereof, and interpones their authority thereto.' At the general election for the parliament held in 1708, peers eldest sons were returned from several shires and boroughs in Scotland. Against these returns petitions were preferred to the House of Commons; and, in a petition from a number of the freeholders of the county of Aberdeen, for which Lord Haddo, the eldest son of the Earl of Aberdeen, had been elected, it was strongly urged, that the allowing a precedent of that kind would not only render the freeholders subservient to the nobility, but would likewise sensibly affect the very being and constitution of a British House of Commons, by bringing the representation for Scotland into the hands of a numerous and powerful peerage. The petitions being taken under the consideration of the House of Commons, and a motion being made, and the question put, 'That the eldest sons of the peers of Scotland were capable, by the laws of Scotland, at the time of the union, to elect, or be elected, as commissioners for shires or boroughs, to the parliament of Scotland, and therefore, by the treaty of union, are capable to elect, or be elected, to represent any shire or borough in Scotland, to sit in the House of Commons of Great Britain, it passed in the negative. See *Journals of the House of Commons*, Veneris  
' 30mo



ever, be elected for any county or borough in England, no such prohibition taking place in that part of the united kingdom \*. Irish peers may likewise be members of the House of Commons in the British parliament, and may represent any county or borough in Great Britain, if otherwise possessed of the necessary qualifications; for, though dignified with the highest titles in Ireland, and entitled to sit in the House of Lords of that kingdom, they are here considered only as commoners.

The act of the 19th of George II. cap. 38. which, as has already been observed, debars those peers from the privilege of voting, who, within a year preceding an election, have been twice present at divine service in an Episcopal meeting, the pastor whereof has not taken the oaths to government, and does not pray for the king by name, and for the royal family, according to the liturgy of the Church of England, does in like manner apply to the electors of commissioners from shires. It is competent to any candidate, or member of the meeting for election, to make an objection on that head,

‘ 30mo die Decembris, anno 7mo Annae Reginae 1708.’ And for a more particular account of the debate, see *Scot's History of Scotland*, page 746. The eldest sons of peers might, however, sit in the parliament of Scotland as officers of state, although incapable of representing either a shire or a borough. The Earl of Drumlanrig, one of the commissioners of the treasury, was nominated by King William to sit as an officer of state in the year 1693.

\* It is said, that the first time the eldest sons of peers were permitted to sit in the House of Commons in England was in 1550, during the reign of Edward VI. when Sir Francis Russell, who, by his brother's death, came to be presumptive heir to his father, Lord Russell, created Earl of Bedford, was allowed to retain his seat. See *Rapin*, vol. 2. page 19.; *Burnet's History of the Reformation*, vol. 2. page 143.; *Carte*, vol. 3. page 275.; *Precedents of Proceedings in the House of Commons by Mr Hatsell*, published in 1781, page 10. 11.



head, and to prove it either by one witness \*, or by the oath of the person objected to; and, if he refuse to depose when the oath is tendered to him by the preses or clerk of the meeting, he effectually disables himself either from voting in the election, or from being elected at that meeting. This objection cannot, however, be stated before the election of the preses and clerk: The words of the act relate to the election of the member only: Besides, it must be proved to the satisfaction of the freeholders, who are to judge of the evidence produced by the objector: But they cannot act in a judicative capacity till they are constituted into a regular court by the election of a preses. The statute likewise goes upon the idea, that, when it is to be proved by the oath of the party objected to, the oath is to be put to him by the preses or clerk of the meeting. It may also be doubted if it can prevent one from voting in questions of enrolment, even at a meeting for election. Disqualifying statutes, which tend to deprive persons of the exercise of their freehold, ought not to be carried beyond their enacting words: But the statute in question imposes no restraint against voting in questions of enrolment, and only disqualifies those who fall under its predicament from voting in the election, and from being themselves elected. Hence the objection cannot, with any propriety, or to any effect, be stated at a Michaelmas head court, where nothing is to be done but to adjust the roll of freeholders.

By the act of the 2d of George II. cap. 24. it is declared, that no person convicted of wilful and corrupt perjury shall be capable of voting in the election of a member to serve in parliament.

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\* At the election for the county of Cromarty in 1768, the sheriff, upon the application of one of the candidates, granted his warrant for citing witnesses in proof of this objection against one of the freeholders.



The same act likewise provides, that every person who asks, receives, or takes any money or reward, by way of gift, loan, or otherwise, or agrees or contracts for any money, gift, office, employment, or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any election of a member to serve in parliament, or who by himself, or any person employed by him, doth, or shall, by any gift or reward, or by any promise, agreement, or security, for any gift or reward, corrupt or procure any person to give his vote, or forbear to give his vote, in such elections, shall, for every such offence, forfeit the sum of L. 500 of lawful money of Great Britain, to be recovered, together with full costs of suit, by summary action or complaint before the court of session, or by prosecution before the court of justiciary; and from and after judgment obtained against him in such summary action or prosecution, or his being otherwise lawfully convicted thereof, shall for ever be disabled to vote in the election of any member to serve in parliament, and shall also be disabled to hold, exercise, or enjoy, any office or franchise to which he then shall, or at any time afterwards may be entitled, as a member of any city, or borough, town-corporate, or cinque port, as if he were naturally dead.

To check such practices, and to promote the discovery of them, this statute farther enacts, 'That if any person offending against this act shall, within the space of twelve months after such election, as aforesaid, discover any other person or persons offending against this act, so that such person or persons so discovered be thereupon convicted, such person so discovering, and not having been before that time convicted of any offence against this act, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any offence against this act.' By the last clause of the statute, no prosecution can be commenced after the lapse of two years from the time of the offence.

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This statute likewise allows the prosecution for the penalty to be brought either before the court of session, or before the court of justiciary. The forms of procedure observed in these courts differ most materially in some respects. In the former, the intervention of juries is unknown, and the court judges of the fact as well as of the law; whereas, in the latter, no person can be condemned until a jury has found him guilty of the charge brought against him, or at least has found the facts contained in such charge to be proved. It is likewise an established practice in the court of justiciary, that, along with the indictment, the person accused of a crime receives a list of the witnesses by whom the prosecutor proposes to prove the facts set forth in that indictment, and a list of any writings that are to be produced in evidence against him. But no such practice prevails in the court of session, except in trials of forgery, where that court exercises a proper criminal jurisdiction, and may inflict any punishment but death. In complaints for recovering the ordinary penalties inflicted by the several statutes relative to matters of election, which are attended only with pecuniary consequences, there is no reason whatever for the court of session's departing from its common mode of procedure; but it may, perhaps, be thought, that, in prosecutions founded upon this statute, which imposes not only a heavy pecuniary fine, but also disqualifications and disfranchisements, a greater degree of nicety should be observed. It was accordingly objected to a complaint brought before the court of session, that, along with it, there should have been exhibited a list of the witnesses, and of the writings, to be produced in evidence on the part of the complainer: And, in support of this plea, it was maintained, that, as that form must have been observed, if the prosecution had been brought before the court of justiciary, so the statute, by giving the prosecutor his choice of resorting either to that court or to the court of session, could not mean to put it in his power to make the condition of the person complained of either better or worse, by



bringing it before the one court rather than the other, more especially as the action was altogether popular, and might be instituted by any person whatever. But this objection was repelled by the court \*. It seems, indeed, most consonant to the common principles of judicial procedure, that, when the legislature confers a jurisdiction upon several different courts to try a statutory offence, each court must be at liberty to proceed according to its own usual forms, unless it be by the statute subjected to particular regulations in that respect.

This statute has not fixed any time within which an answer must be put in to a complaint before the court of session. That matter is therefore

\* July 1768, *Irwin contra Adam* of Maryburgh. The merits of this complaint were remarkable. Three candidates had started for the county of Kinross, viz. General Irwin, Captain Bain, and Mr Robert Adam, the last of whom was elected; and the General, in his complaint, alledged, that an agreement had been made between Captain Bain and Messrs John and Robert Adam, by which they were to grant their bond to Captain Bain for a certain sum of money, and the Captain, on the other hand, was to give an obligation, binding himself to give his own vote and interest, and to procure the votes of all his friends for one or other of the Messrs Adam to be member for the county; and that, although Captain Bain was not himself present at the election, his friends did accordingly concur in voting for Mr Robert Adam, in pursuance of the agreement. To this it was answered, that, supposing the facts charged to be true, they were not sufficient to found a complaint upon the statute; for, as the bribe was said to have been given to Captain Bain in order to procure his vote, the stipulation did not take effect, as he did not attend the election; that although the other freeholders supposed to be that gentleman's friends voted for Mr Adam, it was not so much as alledged that they were parties to the corrupt agreement charged in the complaint; and that, even admitting the votes of some of them to have been procured by the influence of Captain Bain, that could never be considered as corruption on their part, there being nothing in law to hinder a person from giving an honest and fair vote at an election, although he has been prevailed on to give that vote by the solicitation or interposition of a friend who was to receive a reward for using his interest with him. The court gave no judgment upon this defence, but allowed a proof before answer, and the complaint was dropped soon after.



therefore at the discretion of the court. In the case from the county of Kinross above referred to, thirty days were allowed to one of the parties, who was not at the time residing in Scotland; but, to the other, fifteen were only given. Upon a former occasion, viz. in the case of General Sinclair against Sir John Gordon of Embo, in 1747, the respondent got three weeks to put in his answer. If the prosecution be brought before the court of justiciary, the usual forms must be observed, and the common *induciae* of fifteen days must accordingly be allowed.

By a late statute \* it was enacted, that no commissioner, collector, or other officer or person whatsoever, employed in charging, collecting, levying, or managing, the duties of excise or customs, or the duties on salt, or windows, or houses, or any of the duties on stamped vellum, parchment, or paper, nor any person appointed by the commissioners for distributing of stamps, nor any postmaster, or postmasters general, or their deputies, or any person employed by, or under them, or their deputies, in receiving, collecting, or managing, the revenue of the post-office, nor any captain, master, or mate, of any ship, packet, or other vessel, employed by, or under, the postmaster, or postmasters general, in conveying the mails to and from foreign ports, should be capable of giving his vote for the election of any knight of the shire, commissioner, citizen, burgess, or baron, to serve in parliament, for any county, stewartry, city, borough, or cinque port, or for choosing any delegate in whom the right of electing members to serve in parliament for that part of Great Britain called Scotland is vested. The disqualification introduced by this statute is also made to continue for twelve kalendar months after these persons shall cease to hold, or execute their offices; and those who presume to vote within that period are subjected to a penalty of L. 100 Sterling,

\* 22d George III. cap. 41.



ling, to be recovered by any person that shall sue for the same, by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, or by summary complaint before the court of session in Scotland, and the persons convicted on any such suit become thereby disabled, and incapable of ever bearing or executing any office or place of trust whatsoever under his Majesty, his heirs, and successors.

It is, however, by this statute declared, that it shall not extend to commissioners of the land-tax, or to persons acting by, or under, their appointment, for the purpose of assessing, levying, collecting, receiving, or managing, the land-tax, or any other rates or duties already granted or imposed, or which shall hereafter be granted or imposed by authority of parliament. Hence it should seem that the collectors of the land-tax in Scotland, who are appointed by the commissioners, are not disqualified, although it is part of their business to levy the duties on windows and houses.

The statute likewise declares, that it was not to extend to offices held by letters patent for any estate of inheritance or freehold; and that no person should be liable to any forfeiture or penalty thereby imposed, unless a prosecution were commenced within twelve months after such penalty or forfeiture had been incurred.

Although this statute disqualifies these officers from voting in the election of a knight of the shire, &c. it does not prevent them from acting as freeholders in any other respect. They are therefore at liberty to vote, even at a meeting for election, in the choice of preses and clerk, and in every question relative to the adjustment of the roll. The law may, perhaps, be in that respect defective, but it cannot be extended beyond its enacting words.



## CHAPTER IV.

*Of the Alterations in the Circumstances of a Freeholder sufficient to Strike him off the Roll.*

IT has been already mentioned, that, when no complaint is entered against an enrolment within four kalendar months, or when a complaint then entered is dismissed, the person so admitted must continue upon the roll until an alteration of his circumstances happen which shall be allowed by the freeholders, at a subsequent Michaelmas meeting, or meeting for election, as a sufficient cause for striking him off. It will therefore be proper to consider what alteration of circumstances ought to be held a sufficient cause for the freeholders exercising such power.

By an alteration of circumstances, the law understands an alteration of that right or title in respect of which a freeholder has been enrolled.

Supposing, therefore, that a person has been enrolled upon an estate which he then held both in property and superiority, but that, after his enrolment, he parts with the property, or *dominium utile*, by granting a feu charter or disposition to another person to hold the lands as his vassal, and that such vassal takes infeftment in the lands in virtue of the precept of feifine contained in the charter or disposition; that would no doubt be an alteration of circumstances; yet, in the eye of law, it is not an alteration of the title upon which he was



was enrolled, a bare superiority being sufficient for that purpose, and his right to the superiority still remaining upon its original footing. In order, however, to enable a person in that predicament to take the trust oath with perfect security, it seems proper that he should explain the matter to the freeholders at the first meeting he attends, and get his title to stand upon the roll put upon its true footing.

Supposing, again, that a person, in the view of making an alteration of his family settlements, shall resign his whole estate (in respect of which he had been formerly enrolled) in the hands of the crown, for the purpose of obtaining a new charter to himself, and a certain series of heirs; Can he continue upon the roll; or must he be struck off, and become incapable of being readmitted till a year after the registration of the investment he takes upon his new charter? There is no doubt, in that case, an alteration of his title; but still his claim to the privileges of a freeholder is as justly founded as ever. He is invest, and in possession of the very same lands upon which he was originally enrolled; and it certainly was not the intention of the legislature to put improper hardships upon freeholders, but only to order those to be struck off the roll who had no longer a just title to continue upon it. An objection founded upon an alteration of circumstances of that kind ought therefore to meet with no regard, even although it were made between the period of his resigning his estate in the hands of the crown, and his being invest upon his new charter.

A question arose lately, Whether a person could be struck off the roll on account of his having conveyed his estate to his son, who was base invest upon the precept contained in the disposition, but had granted an obligation not to execute the procuratory of resignation, or to take any step for divesting his father of the superiority during his life, and had recorded that obligation in the register of feifines?



seifines? By this manoeuvre the father preserved the superiority, which is all the law requires to constitute a freehold qualification, and the objection was accordingly repelled both by the freeholders and in the court of session \*. The obligation granted by the son was only dated a few months before the objection was made, though the disposition had been executed for several years: But that circumstance was of no moment; the father was formerly absolute proprietor; he continued to hold the superiority so long as the procuratory of resignation was not executed by the son; the obligation therefore did not create, but only preserved his right to continue upon the roll. It appears to have been thought a point of no consequence whether the obligation was recorded or not.

It is a much nicer question, Whether a person who has conveyed the estate on which he was enrolled, to trustees for the behoof of his creditors, with power to the trustees to sell it without his concurrence, has a right to continue upon the roll as long as the trustees do not execute the procuratory of resignation, so as to entitle them to hold of the crown, and to divest him fully of the superiority as well as of the property? At the election for the county of Fife in January 1776, it was moved to strike David Loch of Overcairnbee off the roll, in respect that he had granted a disposition of his estate, containing procuratory of resignation, and precept of seifine, to a  
N n trustee,

\* March 7. 1781, Ruffel *contra* Fergusson of Auchinsoul. A similar case came from the county of Perth in 1765. Craigie of Dumbarnie stood enrolled for the lands of Kintullo. These he sold, and granted to the purchaser a disposition in the ordinary form, containing procuratory of resignation, and precept of seifine. The purchaser was infest base in virtue of the precept, but granted his obligation not to take a public infestment, by executing the procuratory during the life of the seller, to whom, as his superior, he paid the blench duties stipulated in the conveyance. Mr Craigie's right to continue on the roll was objected to, but sustained by the freeholders. Of their judgment a complaint was preferred to the court of session; but no decision was pronounced upon it, the parties having settled the matter amicably.



trustee, for behoof of his creditors, who had accordingly been base infest in virtue of the precept. The majority of the freeholders repelled the objection. A complaint was preferred to the court of session, in which it was maintained, that, as it was in the power of the trustee to divest him whensoever he pleased, by executing the procuratory of resignation, or obtaining a confirmation of the base infestment, or by selling the estate, Mr Loch's right was altogether pendent upon the will of another, and a sufficient alteration of his circumstances had taken place to justify the striking him off the roll. But, in the answer to the complaint, it was contended, that as, by the act 1681, it was enacted, 'that no person infest for relief, or 'payment of sums, shall have vote, but the granters of the saids 'rights, their heirs and successors,' Mr Loch's title to continue upon the roll stood unquestionable, notwithstanding the trust disposition. This case never received the determination of the court, the merits of the election having been settled by a committee of the House of Commons, without its being necessary to consider Mr Loch's right to vote, and he accordingly remained upon the roll till his death.

The question, however, received the decision of the court of session soon after the general election in 1780. Gilbert M'Adam of Merkland had been enrolled a freeholder of the county of Ayr in 1771; but, at the meeting for election held on the 16th of October 1780, it was objected, that he had divested himself of his estate by a trust deed containing precept and procuratory, for behoof of his creditors, and that the trustees had repeatedly advertised a sale of the lands in the newspapers. The freeholders repelled the objection: And a complaint having been preferred to the court of session, it was pleaded for Mr M'Adam, *in*o, That a trust conveyance does not absolutely divest the granter, who, at any time before a sale, may redeem his lands by payment of his debts, in which event his right

is



is completely restored by a bare renunciation on the part of the trustees, even though infest, but that, in this case, no infestment of any kind had been taken by them, and the disposition could be considered as no more than a mandate to sell: And, *2do*, That his vote was preserved entire by the act 1681. But to this it was answered, *1mo*, That, if the trustees had executed the procuratory they would have become the crown's vassals, and the truster's right would have resolved into a merely personal claim of reversion; and that, as nothing prevented the trustees from taking that step when they pleased, his right was become totally precarious, and extinguishable at the will of another, and, consequently, ceased to entitle him to a freehold qualification. And, *2do*, That, in the case of rights for relief, or security of sums of money, alluded to in the act 1681, though the incumbrance might render the property useless, or of little value to the owner, the radical right still remained in him; but that, in the case of trust dispositions, containing a power to sell, nothing substantial was left, and even the nominal right could be in a moment annihilated. The court sustained the objection, and ordered Mr M'Adam to be expunged from the roll \*.

It has been made a question, Whether one who had been enrolled in respect of his whole estate, had a right to continue upon the roll after alienating a part of that estate to another, either in the view of an absolute sale, or for the purpose of granting to his disponent a freehold qualification? It has, however, been justly held sufficient to protect him from being struck off, that he can show that he has retained to himself such a qualification as would entitle him to be enrolled upon a new claim.

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\* March 7. 1781, Muir and Dalrymple *contra* M'Adam.



A remarkable instance occurred from the county of Cromarty in 1765. M'Leod of Cadboll stood enrolled as a freeholder upon his whole estate holding of the crown in that county, which was valued *in cumulo*, in the books of supply, at L. 1361 : 10 : 0. In the view of giving freehold qualifications to some of his friends, he obtained a division of this *cumulo* valuation amongst the different farms or parcels of which his estate was composed, after which he granted a feu of the whole, in order to separate the superiority from the property. This being done, he obtained a new charter upon his own resignation, and granted wadsets of the superiority of certain parts of his estate to some, and conveyances of different parts of it to others of his friends in liferent, and to himself in fee, the lands of which he thus retained the fee, appearing from the division of his *cumulo* valuation to be valued at L. 532 : 6 : 4. An objection being lodged in due time, Mr M'Leod was struck off the roll at the Michaelmas meeting in 1765, in respect of this alteration of his circumstances; but, upon a complaint, the court of session found that he had reserved the fee of lands sufficient to entitle him to remain upon it, and granted warrant for his being replaced as fiar of the lands contained in his titles \*. The word *replaced* was properly inserted in this judgment; for, having a right to continue upon the roll, it would not have been doing him justice to order him to be *added* to it, as that would not have restored him to his former rank.

Sir George Suttie was enrolled as a freeholder in the county of East Lothian, in respect of his whole estate in that county, which  
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\* January 17. 1766, M'Leod of Cadboll *contra* Sir John Gordon; affirmed in the House of Lords, March 1766. In this case it did not appear that Mr M'Leod had produced evidence to the freeholders that he had retained a sufficient freehold qualification; but, as he proved that fact under the complaint before the court of session, that was held enough to entitle him to be replaced on the roll.



was valued at L. 1761 : 11 : 2. He afterwards sold ninety-eight acres of that estate, without getting any disjunction of the valued rent; and, on account of this alteration in his circumstances, an objection was made to his right to continue on the roll; but, as the freeholders were convinced that so small an alteration could not possibly reduce his valuation below the legal standard, they repelled the objection, and their judgment was affirmed in the court of session, by which time it was made to appear, by a new division, that the valuation of the ninety-eight acres did not much exceed L. 100.

Sir Gilbert Elliot was enrolled a freeholder in the county of Roxburgh in 1777, as heir apparent to his father. The valuation of his estate was above L. 4000 Scots; but before the general election in 1780, he split it into nine different parcels, for the purpose of constituting the like number of freehold qualifications. One of these he retained to himself; and at the meeting for election he presented a claim for having his enrolment restricted to the particular lands therein mentioned. Upon this occasion it was objected, that, although by a late division, the lands which he had thus retained to himself were separately valued, yet, since that division, he had conveyed away a considerable part of these lands without obtaining a new disjunction, so that he had only part of an undivided *cumulo*, which could not afford a legal qualification. But the freeholders being convinced by the evidence laid before them, that, after making a sufficient allowance for the lands conveyed away, there still remained more than L. 400, they repelled the objection. A complaint was preferred to the court of session, where it was contended, that the freeholders had no power to divide a *cumulo* valuation; that it was the province of the commissioners of supply alone to do so; and that, if the former were to take it upon them to determine the extent of valuation by arithmetical calculations, and by proportioning the valued to the real rent, they might supersede the work of the latter



latter altogether. But to this it was answered, that the decree of division did itself sufficiently ascertain the valuation of each parcel, both that which was conveyed away, and that which was retained; for it not only mentioned the real rent of that whole lot of the estate, and the corresponding valuation, but likewise stated the real rent of each article of which that lot was composed: The valued rent of the whole estate was divided according to the real rent of each lot; and, consequently, each article of any particular lot must, from the nature of the operation, have a proportion of the valued rent given to the whole lot, corresponding to the extent of its real rent: Although, therefore, the freeholders could not divide valuations, yet they had eyes to read, and sense to understand a decree of division when produced to them; and it would have been ridiculous to have called a meeting of the commissioners of supply merely to perform an operation in the rule of three, which, from the data in the decree itself, could be performed by any person acquainted with the rudiments of arithmetic. The court accordingly repelled the objection, and dismissed the complaint \*.

An exchange of small parcels of land, for the purpose of straightening marches, does not afford any ground for striking a freeholder off the roll, even although his valuation be no greater than the law requires. It is to be presumed that he gets as much as he gives; and transactions of that sort are not understood to make any alteration upon the comparative value of either estate. In a case from the county of Forfar, no less than forty acres had been given off by one proprietor to his neighbour; but, as he received another piece of land in exchange, it was understood that the transaction made no variation upon the extent of his valued rent †. When small lots of  
land

\* January 17. 1781, Sir John Scot of Ancrum, and Kerr of Abbotrule, *contra* Sir Gilbert Elliot.

† 1768, Skene of Skene *contra* Graham of Flemington.



land are exchanged for the purpose of freighting marches, it is not usual for any formal conveyances from the one proprietor to the other to take place; but, if considerable tracts of ground are exchanged, and mutual dispositions are granted, there is an alteration of their respective estates; and it should seem that a transaction of that nature might afford an objection. It has also been maintained, that, when a freehold qualification depends upon old extent, a small and trifling dismemberment, for the purpose of freighting marches, must be fatal, although the ground received in exchange be equal as to quantity and quality, seeing, that, if the old extent of the lands on which the freehold was constituted were only 40 shillings, the smallest alienation would reduce them below the legal standard; and, even although their extent were so much higher as to render it totally improbable that the alienation could have that effect, yet, by the act of the 16th of George II. no division of the old extent could now be made, and, therefore, the alienation, how trifling soever, must put an end to the qualification. This argument, however, was not listened to either in the Court of Session \*, or in the committee of the House of Commons that tried the merits of the election in 1780 for the county of Ayr.

The reduction of a decree of division of valuation throws matters back into their former state; and, until a new and proper division takes place, none of the several parcels of land to which the former *cumulo* was applicable have any separate valuation. It should therefore seem, that, when two or more persons have been enrolled in consequence of a decree of division ascertaining the respective valuations of each, they must all be liable to be struck off the roll in the event of that decree being set aside in a process brought before the court of session for that purpose. But although such of them as, from  
the

\* February 1781, Hamilton of Sundrum *contra* Bogle of Shettleston.



the proceedings in the process of reduction, appear to have got L. 400 of valuation allotted them, when their lands were not entitled to so great a proportion of the *cumulo*, must undoubtedly be struck off, it would be hard to strike off the others, whose valuation, instead of being diminished, was evidently to be increased upon a proper division being made.

## CHAPTER



## CHAPTER V.

*Of the Persons entitled to be elected Commissioners to Parliament from Shires or Stewartries in Scotland.*

HAVING already shown who have a right to vote in the election of commissioners from shires, we now come to consider what persons are entitled to be elected.

Although it is a general rule that none can be elected but those who can elect, yet a county may, for a time, be represented by a person who is not himself entitled to vote in the election of its commissioner. This may appear at first sight a singular notion: A moment's attention will, however, show that it is well founded. Let us suppose that a person is elected to represent a county in which he has no estate, but a proper wadset, and that, during the continuance of the parliament, a decree of declarator of redemption is obtained against him, or that he grants a voluntary renunciation of the wadset. Let us, in like manner, suppose, that a person who stands upon the roll as a proprietor of lands is elected, and that, during the course of that parliament, he sells these lands, or that they are evicted from him, and found to belong to another. In either of these cases, there arises an alteration of circumstances sufficient to authorise the freeholders to strike him off the roll, or to found a complaint at the suit of an objector, if they refuse to do so. He will still, however, continue to represent the county till the conclusion of the parliament, unless it be supposed that the House of Commons has a



right to declare him incapable to hold his seat in their house, and a writ be issued for a new election \*. Many similar cases may be figured; but the above are sufficient to show, that, although no person can be duly elected who is not enrolled as having a proper qualification within a county, yet such county may, for a time, be represented by one who is struck off, or justly liable to be struck off, the roll, and is, in truth, possessed of no qualification whatever.

But although none can be elected but those who can elect, many can elect who cannot be elected.

By the statute 6th Annae, cap. 7. § 30. it was enacted, that every person disabled to be elected, or to sit or vote in the House of Commons of any parliament of England, should be disabled to be elected, or to sit or vote in the House of Commons of any parliament of Great Britain. It becomes, therefore, necessary to consider who were disabled by the laws in force in England at that time, as well as by the new regulations that have been made in this respect by subsequent British statutes.

It has already been mentioned, that the eldest sons of peers are disqualified, and that minors were declared incapable to be elected by the Scottish statute 1707, cap. 8. A similar prohibition was likewise established in England by the act of the 7th and 8th of William III. cap. 25.

#### Aliens

\* Sir George McKenzie informs us, that, in the convention of the estates 1678, it was found, that the freeholders of the county of Perth, having elected their commissioners at the usual term of Michaelmas, they could not make a new election, although the commissioners chosen at Michaelmas had been divested of their estates in the county before the convention met; *Observations*, page 259.



Aliens never could be elected members of parliament, not being the King's liege subjects; and, by the statute of the 12th and 13th of William III. cap. 2. it was expressly enacted, that, after the limitation of the crown to the Princess Sophia, and her heirs, should take place, no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereto belonging, (although naturalised, and made a denizen, except such as were born of English parents), should be capable to be a member of either house of parliament\*; but, by an act of the 1st of George I. stat. 2. cap. 4. it was declared, that this prohibition should not extend to disable any person, who at or before that King's accession to the crown was naturalised. This last mentioned statute, however, farther enacted, that no person should be naturalised, in time to come, unless, in the bill exhibited for that purpose, there were a clause declaring that he should not be enabled to be a member of either house of parliament. Clauses to that effect are accordingly to be found in all the general acts of naturalisation. See the statutes of 13th George II. cap. 7.; 28th George II. cap. 44.; 22d George II. cap. 45.; 2d George III. cap. 25. It has been customary, in the case of foreign Princes marrying into the royal family, (as the Prince of Orange and Prince of Brunswick), to repeal this clause by a previous act, and then to pass the act for naturalisation without any restriction, so that these Princes become immediately Englishmen to all intents and purposes, and capable of sitting in parliament.

None of the twelve judges of England can be chosen, because they sit as assistants, to give their advice when called for, in the House of Lords†. This was formerly likewise the case with re-

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\* This seems to have been enacted in order to prevent the influence of foreigners, when a foreign family should come to succeed to the crown.

† Coke, Inst. 4. page 47.



spect to the Attorney and Solicitor General \*, but it has been in disuse since the restoration. By a British statute †, no judge of the courts of session or justiciary, or baron of the court of exchequer in Scotland, can be elected ‡.

The clergy, though entitled to vote when possessed of freeholds, are likewise incapable of being elected ||. The reason usually given for this in England is, that they sit in the convocation §: And notice has already been taken of an act of the Scottish parliament, in the

\* See Blackstone, vol. 1. page 168.; Biog. Brit. vol. 1. page 384, voce Bacon; Hatsell's Precedents, page 16.

† 7th George II. cap. 16.

‡ Before this act passed, there were two instances of barons of the court of exchequer in Scotland sitting in parliament, viz. Baron Scrope and Baron Miller. See *Douglas's Cases of Controverted Elections*, vol. 2. page 446. Since it passed, a judge of the court of session resigned his place in order to get a seat in parliament.

This act should seem to disable the Lord Justice General, if a commoner, from being elected a member of the House of Commons. It may be asked, If it will likewise exclude the Lord High Treasurer of Great Britain? It ought not; for, although he is a judge, yet he is not a Baron of the court of exchequer.

|| Coke, 4th Inst. page 48.

§ In the first year of Queen Mary, 12th October 1553, a committee of six persons was appointed to inquire, Whether Alexander Nowell, burgess of Loo in Cornwall, prebendary of Westminster, might be of the House of Commons? and, on the next day, the following report was made: 'It is declared by the commissioners, that A. Nowell, being prebendary in Westminster, and thereby having voice in the convocation house, cannot be a member of the house, and that the Queen's writ be directed for another burgess in that place;' *Journals*, vol. 1. page 27. col. 2. Similar resolutions were formed on the 7th of February 1620, and on the 17th of January 1661; *Hatsell's Precedents*, page 6. The reader will find this point discussed in the 3d volume of the parliamentary history, page 274.



the time of James VI. of Scotland \*, by which it was enacted, that no minister of the gospel should accept, use, or administer, any place of judicature, in whatever cause, civil or criminal. Upon the 21st of May 1700, an order was issued by the parliament for electing a new commissioner for the borough of Linlithgow, in the room of William Higgins who had become a minister.

The same person may, at a general election, happen to be chosen from two different places; and, in that event, he must make his election when he comes to take his seat in the house, provided there be no petition against him, and the time limited for giving in petitions be expired; but, otherwise, a person who is elected and returned a member of the House of Commons is not eligible for any other place until his seat be vacated. Mr Hatsel says, page 46. that one reason for this is, 'that, though a member is elected by the freeholders of a county, or the electors of a particular borough, he becomes, when elected, the representative of the whole commonalty of Great Britain, and is therefore already the legal representative of the county or borough whose seat is at that time vacant.'

Sheriffs of counties, and mayors and bailiffs in England, cannot be elected in their respective jurisdictions, as being themselves returning officers †: And, by the act of the 21st of George II. cap. 19.

no

\* 1584, cap. 133.

† Hale of Parliament, 114. Every writ contains a *nolumus* in the following words: 'Nolumus autem quod tu seu alius vicecomes dicti regni nostri aliquo modo sit electus.' Such has been the form for more than three centuries: But, although the words are comprehensive enough to exclude a sheriff of one county from being elected for another, or even for a borough within another county, the force of the prohibition has been much shaken in this respect; and it is now understood to exclude them only from representing the counties of which they are sheriffs, or any borough within such counties.



no sheriff-depute can be elected for any county or borough in Scotland \*. Fountainhall tells us †, that, in a controverted election in the parliament of Scotland in 1686, it was objected, that a sheriff-depute had no right to vote. No such objection, however, lies. Provosts, or bailies of boroughs, may be elected even for their own boroughs, for, in Scotland, they are not returning officers.

By different statutes ‡, none of the persons concerned in the management of any duties or taxes imposed since the year 1692, (except the commissioners of the treasury), nor commissioners of prizes, sick or wounded, transports, wine licenses, navy and victual-  
ing

ties. At the general election in 1774, John Mayor, Esq; the high sheriff of Berkshire, was elected to represent the borough of Abingdon within that county, and he accordingly returned himself. A petition was preferred for Nathaniel Bayley, Esq; the other candidate, who insisted, *1mo*, That Mr Mayor was ineligible for any borough within the county; and, *2do*, That his ineligibility having been publickly intimated to the electors at the place of election, and before the taking of the poll, the votes given for him were to be held as thrown away, and he, Mr Bayley, though chosen by a smaller number, was to be considered as duly elected. The committee, upon the 6th of March 1775, informed the house, that they had determined, 'that neither the fitting member, nor the petitioner, were duly elected, and that the election was void.' See *Douglas, vol. 1. page 419. et seq.*

\* In 1745, Mr Charles Maitland, who had been for some time sheriff-depute of the shire of Mid Lothian, was elected for a district of boroughs in Scotland. A petition, founded on his ineligibility, was presented by Mr Scot of Scotstarvit, the other candidate; but it having appeared that Mr Maitland had resigned that office ten days before the election, although the resignation had not then been accepted, Mr Scot withdrew his petition; *Journals, vol. 25. page 667. col. 1. 2. page 710. col. 1. page 713. col. 2.*

† Vol. 1. page 413.

‡ 5th William and Mary, cap. 7. § 57.; 11th and 12th William III. cap. 2. § 150. et seq.; 12th and 13th William III. cap. 10. § 89. et seq.; 6th Anne, cap. 7. § 25. et seq.; 15th George II. cap. 22.



ing offices, secretaries or receivers of prizes, comptrollers of the army accompts, agents for regiments, governours of plantations and their deputies, officers of Minorca or Gibraltar, officers of the ex-cise and customs \*, clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licenses, hackney coaches, hawkers and pedlars, nor any persons that hold any new office under the crown erected since 1705, are capable of being elected.

It will not be improper here to give a short account of some cases determined by committees of the House of Commons, under the authority of the well known acts of the 10th and 14th of his present Majesty.

The court of exchequer in Scotland, as it is now modelled, was established by an act of the 6th of Queen Anne, cap. 26. which particularly enacted, 'that there shall be in the said court of exchequer in Scotland the several offices following, that is to say, 'the office of Queen's Remembrancer, the office of Lord Treasurer's Remembrancer, the office of Clerk of the Pipe,' &c. Upon the 25th

\* The following resolutions were made upon the 10th of April 1711: 'Resolved, 'that the hereditary offices of an inspector and searcher of all prohibited and uncustom-  
'ed goods, and keeper of the coquets in the ports of Ely and Anstruther in North  
' Britain, are within the meaning of the act of parliament of the 12th and 13th years  
' of his late Majesty, King William, whereby any member of the House of Commons  
' having an office, place, or employment, concerning the farming, managing, or col-  
' lecting the customs, is absolutely incapable of being a member of this House. Resol-  
' ved, that Sir John Anstruther having, by the death of his father, the *hereditary offices*  
' of an inspector and searcher of all prohibited and uncustomed goods, and keeper of  
' the coquets in the ports of Ely and Anstruther in North Britain, *descended* to him,  
' but not having taken, enjoyed, or executed the same, is capable of being a member  
' of this house.'



25th of January 1771, his Majesty granted to Andrew Stewart and Patrick Warrander, Esquires, and to the survivor of them, the joint office of King's remembrancer. Mr Stewart having declared himself a candidate for the county of Lanerk at the general election in 1774, he, upon the 18th of October 1774, signed and sealed, in the presence of two subscribing witnesses at Edinburgh, an instrument, importing his desire to resign the office, or all his share and interest in it, and that he accordingly thereby resigned it into the hands of the King, or of the officers or commissioners impowered to receive it. This instrument was transmitted to the then Solicitor General of England, (now Lord Loughborough), for the purpose of his delivering it Lord North, then first Lord of the Treasury, or to Mr Cooper or Mr Robinson, the two secretaries of the Treasury. It was accordingly delivered upon the 25th of the same month to Mr Cooper, who on that day informed Lord North of his having received it. But it did not appear at the trial of the merits of Mr Stewart's election that the resignation had been communicated to his Majesty, or even laid before the board of treasury. The election came on upon the 28th of October, and Mr Stewart having the majority of votes in his favour, was returned. Mr Campbell of Shawfield, the other candidate, complained, by petition, to the House of Commons, on the ground that Mr Stewart was ineligible, being, at the time of the election, in possession of an office under the crown, created or erected since the 25th of October 1705. It was agreed by the counsel, and the committee, that the question, whether Mr Stewart was or was not possessed of the office at the time of his election, should be inquired into, and determined separately, and the committee came to the following resolution: 'That it is the  
' opinion of the committee that Andrew Stewart, Esq; by the in-  
' strument of resignation executed at Edinburgh on the 18th of  
' October 1774, and delivered to Mr Cooper on the 25th of the  
' same month, was, at the time of his election, divested of the of-  
' fice



‘fice of King’s Remembrancer in the court of exchequer in Scotland.’

This resolution, of course, put an end to the cause, and rendered it unnecessary to inquire whether the office was to be considered as a new office created since the 25th of October 1705.

The election of the Honourable John Maitland for the district of North Berwick, Haddington, Lauder, Jedburgh, and Dunbar, in 1774, gave rise to a similar question before a committee of the House of Commons. Mr Maitland, at the time of his election, held the office of clerk of the pipe in the court of exchequer in Scotland, and Sir Alexander Gilmour, the other candidate, insisted that it was an office created or erected since the 25th of October 1705, and consequently disqualified the fitting member. It is unnecessary to state here at length the argument maintained by the counsel, which the reader will find in Mr Douglas’s cases. It was, in general, contended for the fitting member, *1mo*, That the office, though under a new name, was of a similar nature with that of the dictator of the rolls, which had long subsisted in the court of exchequer in Scotland, before it came to be new modelled after the union of the two kingdoms; and, *2do*, That, even supposing it to be a new office, it was created not by the crown but by parliament, and, therefore, did not come properly under the enactment of the statute. It was farther observed, that, in practice, both remembrancers and clerks of the pipe had been returned, and sat in parliament. William Stewart, the first King’s remembrancer in Scotland, was elected and returned, in 1713, for the district of Inverness, &c. In 1747, Andrew Fletcher, junior, of Saltoun, then clerk of the pipe, was returned for this very district of North Berwick, &c. In 1754, John Stewart of Castle-Stewart, who then held the same office, was re-elected, and, in the return, was particularly described by his office of clerk of the pipe. And,



in 1769, Mr Warrander, King's remembrancer, was likewise returned for the same district of North Berwick, &c. and although his election was contested on other grounds, no objection was taken to his eligibility on account of his holding that office. The committee came to the following resolution: 'That the Honourable John Maitland was eligible to serve in parliament, notwithstanding his being in possession of the office of clerk of the pipe in the exchequer of Scotland at the time of his election.'

In 1779, Major General Skene was elected and returned for the county of Fife; but Mr Henderson, the other candidate, having, at the meeting for election, and before the votes were called, objected to the General's eligibility, in respect of his holding the office of inspector general of the military roads; and, having afterwards preferred a petition to the House of Commons, the committee found that the General was ineligible, and that Mr Henderson was duly elected.

It has been made the subject of debate, Whether offices created by parliament since 1705 fall under the sanction of the statute? On the one hand it has been maintained, that its object was to seclude, not offices created by parliament, which could not be presumed capable of indirect purposes in such creation, but offices which the crown might create without necessity, and with the disguised intention of extending its influence; whereas, on the other hand, it has been observed, that, to found a distinction of that sort, the words *created or erected* ought to have been followed by these other words, *by the royal authority*; and that no such restrictive construction is authorized by any thing in the statute, or by any decision upon it\*.

In

\* See Douglas, vol. 2. page 436. 447.



In February 1779, the House of Commons found that this statute did not strike against the commissioners appointed to treat with the Americans; and, upon the 11th of March 1779, a motion made against Lord George Germaine's capacity to be a member of the house, in respect of his being Secretary of State for America, was thrown out.

It is, in like manner, enacted, that no person having a pension from the crown, either during pleasure, or for any term of years, shall be capable of being elected; and that any person having such pension, who shall presume to sit or vote in the House of Commons, shall forfeit L. 20 for every day he shall so sit or vote, to any person who shall sue for the same in any of his Majesty's courts in Westminster Hall \*. All those who, after being chosen members of the House of Commons, accept of any office of profit from the crown, (except officers of the army or navy getting new commissions), do likewise vacate their seats in parliament, and writs are issued for new elections as if they were naturally dead; but, unless the offices accepted by them be of that nature as to disqualify them altogether, they may be re-elected †.

By an act passed in 1778 ‡, it was provided, that the seats of members returned to serve in parliament should not be vacated by their accepting commissions in any of the fencible corps raised, or to be raised, in Scotland, or in any other corps which his Majesty might authorise, and direct to be raised in any part of Great Britain, the officers whereof were not to be entitled to half pay, or to any

P p 2 rank

\* 1mo Georgii I. cap. 56.

† 6to Annae, cap. 7.

‡ 18vo Georgii III. cap. 59. § 4.



rank in the army after their being reduced. Similar enactments had been made with respect to the officers of the militia in England by prior statutes.

By another act passed in 1782\*, it was declared, that, from and after the end of that session of parliament, all persons holding contracts for the public service should be incapable of being elected, or of sitting in the house of Commons; and that the seat of any member accepting of, or continuing to hold, any such contract, after the commencement of the next session, should be void. This enactment was, however, declared not to extend to contracts entered into by any incorporated trading company in its corporate capacity, or by any company then existing and established, and consisting of more than ten persons.

In the writs which were issued for the English parliament held at Coventry in the 6th of Henry IV. a prohibition was inserted against electing any man of the law †. This, however, was unconstitutional; and, as this parliament did, on that account, get the name of *parliamentum*

\* 22do Georgii III. cap. 45.

† The words of this prohibition were, 'Nolumus autem quod tu seu aliquis alius Vicecomes regni nostri, aut *apprentius*, aut aliquis alius homo ad legem, aliquahiter sit electus.' It has been said that the reason of this was, that Henry being in great want of money, was afraid, that, if lawyers were returned to parliament, they would oppose his excessive demands, and by their knowledge and learning in the laws and public affairs, be the means of stopping his illegal purposes. It has also been said, that there was a disgust both in the commons and in the great men against lawyers, as being an hindrance to their oppressions, by pleading the law on behalf of their clients; and it accordingly appears, that, in the 13th of Edward III. the commons prayed, 'that writs be sent that the worthiest knights be chosen, and that lawyers and sheriffs be left out.' See *Whitelock Comm. vol. 2. page 357.*



*parliamentum indoctum*, so Sir Edward Coke observes, that there was not one good law made in it \*.

In England, it is likewise necessary that every knight of the shire have a clear estate of freehold or copyhold to the value of L. 600 *per annum*, and every citizen and burghers to the value of L. 300, except the eldest sons of peers, and of persons who are themselves qualified to be knights of the shires, and the members for the two universities †. But the statutes introducing these qualifications are declared not to extend to Scotland.

In order to prevent bribery and undue influence, it was enacted by the statute of the 7th of William III. cap. 4. that no candidate, after the ordering or issuing the writ for election, should by himself, or by any other means for his behoof, give any money, meat, drink, entertainment, or provision, to his electors, or promise to give any present, gift, reward, or entertainment, either to particular persons, or to any county, city, town, or place, in order to his being elected; and that all persons offending in that respect should be disabled and incapacitated to sit in parliament for such county, city, town, or place, in consequence of such election. This statute was wisely calculated to restrain a most pernicious practice; but every day's experience shews that little regard is paid to the putting it in execution.

## CHAPTER

\* 4th Inst. 48.

† It was moved in the House of Commons, in May 1780, to increase this qualification; but the motion was negatived.



## C H A P T E R VI.

*Of the mode of procedure in the Election of Commissioners to Parliament from Shires in Scotland.*

**I**MMEDIATELY after a parliament is summoned by the royal proclamation, the Lord Chancellor sends his warrant to the clerk of the crown to issue writs to the sheriff of each county for the election of the members to serve for their several shires. This has been the duty of the Chancellor ever since the House of Commons was formed \*. When there is no Chancellor, the warrant is granted by the Lord Keeper, or Commissioners, of the great seal for the time.

In the case of a vacancy happening during the sitting of parliament, the warrant to the clerk of the crown is given by the Speaker of the House of Commons, by order of the house. Till lately, however, there was no mode of supplying a vacancy occasioned even by the death of a member during the recess of parliament †. This was an inconvenience, and a remedy for it was at last introduced by the act

\* Sullivan, page 332.

† The Earl of Shaftsbury, when Chancellor, in the reign of Charles II. did indeed assume the power of issuing writs, while the parliament was prorogued, for electing persons to fill up vacancies in the House of Commons. Of this the Commons loudly complained when the parliament met; upon which the King declared, 'That he had given orders to the Lord Chancellor to send out writs for the better supply of their house, having seen precedents for it; but, if any scruple or question did arise about it, he left it to the house to debate as soon as they could.' The matter was accordingly taken under consideration.



act of the 10th of his present Majesty, cap. 41. which enacted, that from and after the end of the then session of parliament, it should be lawful to the Speaker, during a recess for more than twenty days, whether by prorogation or adjournment, to issue warrants to the clerk of the crown to make out new writs for electing members of the House of Commons in the room of such as should happen to die during such recess. But, in order to entitle the Speaker to grant such warrant, the death of the member must be certified to him by a writing under the hands of two members of the house, and notice of such certificate must be inserted in the London Gazette fourteen days before the warrant be issued.

This statute likewise declares, that the Speaker shall have no authority to issue any such warrant, unless the return of the writ, by virtue whereof the deceased member was elected, has been brought into the office of the clerk of the crown fifteen days at least before the end of the session of parliament immediately preceding the death of such member. When a member vacates his seat by accepting an office during a recess, no new election can be made till the next meeting of parliament, when the Speaker grants warrant to the clerk of the crown to issue a new writ.

The writs \* issued from the crown office ought to be immediately transmitted to the several sheriffs; but they are often given to candidates,

consideration the very next day, when the Commons voted these writs, and the consequential returns, irregular, and expelled the members who had been elected in virtue of them. It was supposed at that time, that, if the crown could issue writs for filling up vacancies in parliament, it would be easy for the ministers to get such members returned as they pleased; and we are accordingly informed, that those who had been returned upon that occasion were all creatures of the court; *Rapin, vol. 2. page 669.*

\* A copy of a writ to a sheriff is to be found in the Appendix, No. 34.



didates, or their agents, upon a receipt and obligation to deliver them. This practice ought, however, to be corrected, as it gives an opportunity of jobbing, by preventing the sheriff from naming so early a day for the election as he might do, were the writ immediately transmitted to him from the proper office \*.

By the act 1681, the sheriffs are impowered to appoint the diet of election. It must, however, according to that act, be at least twelve days before the meeting of parliament †, and must be published at the head borough of the shire upon a market day, betwixt ten and twelve before noon, and at each parish church on the Sunday immediately after, three free days at least before the election ‡.

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\* Upon the 28th of February 1772, a person was brought to the bar of the House of Commons for taking the writ for Monmouthshire from the messenger sent down with it to the sheriff, and so delaying its execution. He acknowledged his fault, and was discharged. At the general election in 1774, the writ for the shire of Clackmannan was with-held from the sheriff for a considerable time. The sheriff at last preferred a complaint, against the person in whose custody it was suspected to be, to the sheriff of Edinburgh, within whose jurisdiction that person then resided. The sheriff of Edinburgh held this complaint to be competent, and took certain steps of procedure, upon which the writ was given up to the sheriff of Clackmannan.

† There is nothing in the statute book fixing within what time an election to supply a vacancy happening during the course of a parliament must take place. The day is left to the absolute discretion of the sheriff; but it is generally understood that it must be within forty days after the date of the writ.

‡ If, at any of the parish churches, on the Sunday when the writ is to be published, there happen to be no divine service, the sheriff's officer makes his publication at the church door, and returns a formal execution stating the fact. See Spottiswood's Law of Elections, page 36. If the sheriff neglect to make intimation of the diet of election, as required by law, he forfeits a penalty of fifty pounds, one moiety to the King, and the other to the person or persons who shall sue for the same before the court of session; 12th Anne, cap. 6. The precept or warrant to the sheriff's officers

for



The freeholders being assembled at the appointed day, betwixt noon and two afternoon, in the sheriff's ordinary court room, the sheriff produces the writ, and reads it in their presence, and likewise produces executions of the publication at the market-crofs, and at the several parish churches \*. If any of these be found informal, the freeholders cannot regularly proceed to an election, and a new precept must be issued by the sheriff, and duly executed †. In practice, however, they are seldom examined ‡.

This part of the business being done, the act of the 2d of Geo. II. cap. 24. intituled, 'an act for the more effectually preventing bribery and corruption in the election of members to serve in parliament,' must be read in the presence of the meeting ||; after which,

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the

for making these intimations, ought to be signed by the sheriff himself; but, in some counties, an erroneous practice of having them signed by the sheriff-clerk has taken place.

\* What is to be done if the sheriff happen to die before the diet for election, and no successor be then appointed to him? That event took place at the general election in 1780. The sheriff of Kincardine had fixed the 29th of September for the election of the commissioner for that shire, but died upon the 17th of that month. The court of session was not then sitting; but the Lord Ordinary officiating on the bills appointed an advocate, properly qualified to hold the office, to act as interim sheriff. Had there been a competition for the representation of the county, the regularity of this procedure, and the power of the Lord Ordinary on the bills to appoint an interim sheriff, might probably have been made a question.

† Spottiswood's Law of Elections, page 36.

‡ Forms of the intimation made by the sheriff, and of the publication thereof, are to be found in the Appendix, No. 35. and 36.

|| This is ordered by the following clause of the act itself: 'And for the more effectual observance of this act, be it enacted, that all and every the sheriffs, mayors, bailiffs,



the sheriff-clerk produces the book in which the roll of freeholders, and the minutes of their proceedings, are inserted, together with copies of the oaths of allegiance, and abjuration, and assurance, and of the trust oath prescribed by the act of the 7th of George II. written on a roll of parchment, in terms of that statute \*.

These preparatory steps being finished, the sheriff has no farther business in the meeting. The commissioner last elected, if present, takes the chair, and administers the oaths of allegiance and assurance to the freeholders †, and likewise the oath of abjuration, if it be required to be put ‡; after which, he proceeds to call the roll, and ask the votes for the choice of preses and clerk to the meeting, having himself the casting or decisive vote, in case of an equality. If the commissioner

‘ bailiffs and other officers, to whom the execution of any writ or precept for electing  
 ‘ any member, or members, to serve in parliament, shall belong or appertain, shall, and  
 ‘ are hereby required at the time of such election, immediately after reading of such  
 ‘ writ or precept, read, or cause to be read, openly before the electors then assembled,  
 ‘ this present act, and every clause therein contained : And the same shall also be open-  
 ‘ ly read once in the year at the general quarter sessions of the peace to be holden next  
 ‘ after Easter, for any county or city, and at every election of the chief magistrate in  
 ‘ any borough, town corporate, or cinque port, and at the annual election of magi-  
 ‘ strates and town counsellors for every borough within that part of Great Britain cal-  
 ‘ led Scotland.’

\* The oath of abjuration (though for what reason I have not been able to learn) is usually written on parchment, and the allegiance and assurance only on paper.

† This is the customary mode of proceeding ; but it is not necessary that any of the oaths to government be taken before the election of preses and clerk, unless it be required.

‡ A complaint to the court of session was once preferred against a commissioner last elected, for refusing to administer the oaths to the freeholders before calling the roll for the election of preses and clerk; but the court found that it did not fall under their cognizance; November 10. 1747, Ker, &c. *contra* Redpath, &c.



commissioner last elected be absent, the oaths are administered, and the roll is called, by the sheriff-clerk; and, in that case, the casting vote belongs, as at the Michaelmas meetings, to the freeholder present who last represented the shire in any former parliament; if none such be present, to the freeholder who last presided at any meeting for election; and, in his absence, to the freeholder who last presided at any Michaelmas meeting; and, failing the attendance of all those, to the freeholder present who stands first upon the roll \*.

To prevent abuses in the choice of preses and clerk, the law has declared, that, if the commissioner last elected, or, in his absence, the sheriff-clerk, receive the vote of any person who does not stand upon the roll, he shall for every such offence forfeit the sum of L. 300 Sterling to every candidate for the office of preses or clerk respectively, for whom such person shall not have given his vote, to be recovered by them, or their executors, by summary complaint before the court of session, upon thirty days notice; or, if he shall not call for, or shall refuse the vote of any person whose name is upon the roll, he shall forfeit the like sum to such person, to be recovered by him, or his executors, in the same summary manner †.

This is, without doubt, a most salutary regulation. It however requires to be more fully explained, as many cases may be figured where a judaical adherence to the letter of the statute might appear inconsistent with that idea of justice which the legislature must be supposed to have had in their view.

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It

\* 16to Georgii II. cap. 11. § 13. I formerly observed, that the law has made no provision with respect to the calling of the roll, in the event of the absence of the commissioner last elected, and of the sheriff-clerk being unable, through indisposition, to attend. See note, page 150.

† 16to Georgii II. cap. 11. § 13.



It frequently happens that two persons stand upon the roll in virtue of the same lands, the one as liferenter, the other as fiar : Must the commissioner last elected, or the sheriff-clerk, call both, and receive the votes of both in the election of preses and clerk? If the statute is in every case to be judaically interpreted, he will incur the penalty, if he omit either the one or the other. But, as by other statutes, the fiar can only vote in the absence of the liferenter, no court can subject him to it for omitting to call, or for refusing to receive, the vote of the fiar, if the liferenter be present, and claim his vote. On the contrary, he would be justly liable to the penalty, were he, in that case, to receive the vote of the fiar.

By the act of the 2d of George II. cap. 24. those who have been convicted of bribery and corruption are for ever disabled from voting in an election of a member to serve in parliament. Supposing that a person so convicted stands upon the roll, must his name be called, and his vote received, in the choice of preses and clerk? It should seem to be unnecessary for the commissioner last elected, or the sheriff-clerk, to do so; and that their omitting to call him, or refusing to receive his vote, cannot, upon a fair and just construction of the statute, subject them to the penalty. It were indeed absurd to suppose, that, in order to give obedience to one statute, they were at liberty to disregard personal disqualifications introduced by other statutes.

It must, however, be admitted, that, in general, the powers of the commissioner last elected, or of the sheriff-clerk, in calling the roll, are merely ministerial; and that, although they may so far exercise their judgment as to leave out those whom the law has clearly disqualified, yet they cannot assume the right of judging whether a person stands wrongfully upon the roll, and, upon that pretence, refuse



fuse his vote in the choice of preses and clerk, how plainly soever it may appear that such person is liable to be struck off after the meeting shall be properly constituted.

Let it be supposed that a person has been enrolled although not a year infest. The freeholders did wrong in admitting him; but that wrong the caller of the roll has no power to remedy. His name must therefore be called, and his vote received, otherwise the penalty will be incurred. Nay, the votes of those who are divested of the estates upon which they were enrolled must be received in the choice of preses and clerk, although the very first business of the meeting, after it is properly constituted, will be to strike them off the roll.

Let it in like manner be supposed, that, by a judgment of the court of session, a person standing upon the roll had been ordered to be struck off, but that the sheriff-clerk, in contempt of that order, had neglected or refused to do so; Would the commissioner last elected be at liberty to refuse such person's vote in the election of preses and clerk, or must he call him under the sanction of the penalty? If exercise of judgment, in a case of this kind, be denied to the commissioner last elected, the election of the preses, and, of course, the election of the member to serve in parliament, may be carried by the voice of one, who, by a judgment of the proper court, has been found to have no right to a freehold qualification\*. But this is a wrong which the commissioner last elected has no power to remedy, without subjecting himself to the penalty. He

\* It may be thought that abuses of this kind will be effectually prevented by the sheriff-clerk's being subjected to a penalty of L. 100, in the event of his not obeying the order of the court of session; but penalties are often little regarded in a contested election, and may be made easy to the sheriff-clerk by the candidate whose interest he means to support by his trespass.



He must call every person who stands upon the roll produced by the sheriff-clerk, and is not liable to a personal disqualification; and if, by that means, a candidate is chosen who otherwise would have lost the election, the only remedy lies in a petition to the House of Commons, who act not in a ministerial, but in a judicative capacity. But what will be the case, if, by reason of the absence of the commissioner last elected, the calling of the roll shall fall to the province of the sheriff-clerk, and he shall take it upon him to call the name, and receive the vote of the person whom he ought to have struck off? It certainly should be no excuse to him that he has obeyed the statute by calling none but those who stand upon the roll, because it was owing to his own malversation that such person did stand upon it; and although the letter of the law may not, perhaps, exactly reach him, it would surely be no great stretch to find him liable in the penalty for calling one whom he himself ought to have struck off.

A remarkable case occurred in the county of Mid Lothian at a meeting for election in 1744. The name of Sir James Stewart of Goodtrees stood upon the roll 1742, which was the one last made up; but there were no minutes extant to shew either the time when the persons standing upon that roll had been admitted to it, or the titles upon which they were enrolled. The then Sir James Stewart appeared at the meeting, and claimed a vote in the choice of preses and clerk, saying, 'there stands my name, and that name you are bound to call;' but the commissioner last elected being convinced, from a variety of circumstances, that the words *Sir James Stewart of Goodtrees*, in the roll 1742, were not descriptive of the then Sir James, but of his father, whose name had been omitted to be struck out upon his death, (as was the case of several others whose heirs had not yet claimed to be enrolled), he refused to receive Sir James's vote. Sir James complained to the court of session, and demanded the



the statutable penalty; but his complaint was dismissed. This was certainly a just decision; for, although the same name was to be found upon the roll, yet the complainer never had stood upon that roll; he, therefore, was not entitled to any penalty on account of his name not being called, or of his vote being refused; and, if the commissioner last elected had received his vote, he would have subjected himself to the penalty imposed by the first part of this clause of the statute, for taking the vote of one who did not stand upon the roll.

Another case of a more recent date, which gave occasion to a great deal of argument, shall likewise be stated. Alexander Frazer of Culduthil stood upon the roll of freeholders of the county of Cromarty made up at Michaelmas 1767, in virtue of several different parcels of land rated at L. 426 : 4 : 2 Scots of valued rent, according to a decree of division pronounced by the commissioners of supply in October 1765. Of these there was one parcel called Glenurquhart, which, by the decree of division, was valued at L. 57 : 18 : 8. Before the election, which took place upon the 26th of April 1768, this decree of division was set aside by the court of session, in an action at the suit of Sir John Gordon of Invergordon, and William Gordon of Newhall, where it was found, that the lands of Glenurquhart were not entitled to any part of the *cumulo* valuation divided by the commissioners of supply. In the course of this action, Mr Frazer had admitted, that, if the pursuers prevailed in it, he would not have a good qualification, as his valuation would be reduced to less than L. 400; but still, when the day of election came, no order had been obtained for striking him off the roll; on the contrary, though it was one of the conclusions of the suit, that it should be declared that Mr Frazer was not entitled to continue upon the roll of freeholders, the court of session found that conclusion incompetent. It appeared, that, if Mr Frazer was allowed a voice in  
the



the choice of the preses, his vote would be decisive of the election, there being only six freeholders in the interest of Sir John Gordon, and seven, including Mr Frazer, in the interest of Mr Pulteney, the other candidate. An extract (exemplification) of the decree of the court of session being produced, Sir John Gordon, who was the commissioner last elected, tendered to Mr Frazer the trust oath prescribed by the act of the 7th of George II. after filling up, in the blank left in the beginning of that oath, the description of his lands, copied *verbatim* from his claim for enrolment, which not only mentioned the names of the several parcels of which these lands were composed, but also bore that they stood valued at upwards of L. 400. Mr Frazer refused to take the oath in these terms, upon which Sir John Gordon attempted to erase his name out of the roll in the sheriff's book, but was prevented by others of the freeholders, who took the book from him. Sir John then produced an extract of the roll, and, after erasing Mr Frazer's name from that extract, called the votes of the other freeholders for the choice of preses and clerk. Upon this the two contending parties separated, and made each of them separate elections, which occasioned a variety of prosecutions for statutable penalties. Among others, Mr Frazer prosecuted Sir John Gordon for L. 600 on account of his not calling him in the election of preses and clerk; and, in support of his complaint, insisted, *imo*, That, as he stood *de facto* upon the roll, Sir John was bound to call him, and to receive his vote, how ill founded soever his qualification might be; and, *2do*, That, as the sole purpose of the trust oath was to ascertain that those who claimed a vote were really and truly owners of the lands under which they sought that privilege, and that they did not hold them in trust for any other person, nothing could be inserted in the blank left in the beginning of that oath but the names of the lands; and that he was not obliged to take it in the manner it was tendered to him, or to swear to the valuation. Sir John Gordon, on the other hand, contended, *imo*, That the several acts of parliament



parliament relative to elections must be expounded by each other, and no particular act implicitly or literally followed, when, by so doing, other statutes regulating the qualification of electors must necessarily be controlled; that the law had expressly required L. 400 Scots of valued rent to entitle one to vote as a freeholder; and that, as Mr Frazer's valuation was, by the decree of the court of session, brought below that sum, he should have been justified in refusing Mr Frazer's vote, even although he had taken the trust oath as it was tendered to him; and, *2do*, That, as the statute of the 7th of George II. had left it a moot point with what precise words the blank in the trust oath ought to be filled up, it must have been intended, that the person with whom the administering that oath was entrusted should be at liberty to insert such words, adapted to the circumstances of the case, as might answer the principal object of the law, which was to allow a vote only to those who were infest in, and possessed of lands liable in public burdens, at the rate of L. 400 of valued rent; and that no better rule could be followed for obtaining that end, than by maintaining an exact correspondence between the oath and the claim for enrolment. The court of session found Sir John Gordon liable in one penalty of L. 300, but assolied (absolved) *quoad ultra* \*. What effect Sir John's not calling Mr Frazer's vote, in the choice of preses and clerk, ought to have had in the subsequent steps of the election, or upon the merits of the return, will be afterwards considered; at present, it will suffice to observe, that, according to the judgment of the House of Lords in the case of Archibald Duff against Sir Ludovic Grant and others, Sir John Gordon had no authority to put the trust oath in any shape before the election of preses and clerk.

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The

\* November 19. 1768, Frazer of Culduthil *contra* Sir John Gordon.



The preses and clerk being chosen, the minutes of their election must be signed by the commissioner last elected, or, in his absence, by the sheriff-clerk, and delivered over to the clerk appointed by the majority of the meeting; and, if either of them neglect or refuse to sign these minutes, a penalty of L. 100 is incurred to the person truly elected preses, to be recovered by him, or his executors, by a summary complaint before the court of session \*.

This act farther declares, that it shall not be lawful for any number of freeholders to separate from the majority of the persons present who stand upon the roll, and to set up any persons as preses and clerk other than those chosen by the majority. In order to enforce this rule, it is enacted, that those who separate from the majority, and set up any other as preses or clerk, shall forfeit L. 50 to the candidate who shall be chosen by the majority from whom such separation is made; and that any person who presumes to act as preses or clerk, without being chosen by the majority, shall forfeit L. 200 to such candidate, to be recovered in the same manner with the penalties already mentioned †.

The clerk chosen by the majority qualifies himself by taking the oaths of allegiance and abjuration, and subscribing the assurance;  
and,

\* 16to Georgii II. cap. 11. § 15.

† 16to Georgii II. cap. 11. § 14.

It has been already mentioned, that, at the election for the county of Cromarty in 1768, the two parties separated upon Sir John Gordon's refusing to receive Mr Frazer of Culduthil's vote in the choice of preses and clerk, and made separate elections. This produced mutual complaints. But the court of session found Sir John Gordon's party in the wrong; and that each of them had incurred a penalty of L. 50 on account of their having separated from the majority; and also found, that Mr M'Intosh, whom they had set up as preses, had forfeited L. 200 for acting in that character. November 19. 1768, William Pulteney and others *contra* Sir John Gordon and others.



and, by the statute of the 16th of George II. so often referred to, he must also take the following oath, which the preses is required to administer \*: ‘ I A. B. do solemnly swear, that I have not, directly  
 ‘ or indirectly, by way of loan, or other device whatsoever, received  
 ‘ any sum or sums of money, office, place, or employment, gratui-  
 ‘ ty or reward, or any bond, bill, or note, or any promise of any  
 ‘ sum or sums of money, office, place, employment, or gratuity  
 ‘ whatsoever, by myself or any other, to my use or benefit, or  
 ‘ advantage, to make any return at the present election of a mem-  
 ‘ ber to serve in parliament; and that I will return to the sheriff,  
 ‘ or steward, the person elected by the majority of the freeholders  
 ‘ upon the roll made up at this election, and who shall be present,  
 ‘ and vote, at this meeting. So help me God.’

The trust oath is then put, if required by any one of the freeholders present, and may be put at any stage of the business. And, upon the demand of any two of the freeholders, the oath of bribery, introduced by the act of the 2d of George II. must likewise be taken before voting for the member to serve in parliament. This oath is as follows: ‘ I A. B. do swear (or, being one of the people called  
 ‘ Quakers, I A. B. do solemnly affirm) I have not received, or had  
 ‘ by myself, or any person whatsoever in trust for me, or for my  
 ‘ use and benefit, directly or indirectly, any sum or sums of money,  
 ‘ office, place, or employment, gift, or reward, or any promise or  
 ‘ security for any money, office, employment, or gift, in order to  
 ‘ give my vote at this election, and that I have not before been  
 ‘ polled at this election †.’

R r 2

The

\* Sect. 37.

† 2do Georgii II. cap. 24. § 1. Had this oath been applicable only to elections in Scotland, the last words of it would have been unnecessary; but, as it is applicable to all elections through Great Britain, and as, in many counties of England, and even in some boroughs, the number of voters is so very great as to put it out of the power of the  
 presiding



The meeting being thus constituted, the freeholders proceed to adjust the roll in the same manner as at the Michaelmas head court; and a new roll being made up, (a signed copy or extract whereof must be delivered to the sheriff-clerk, to be recorded in the sheriff's books), the preses calls that roll, and asks the votes of those present who stand upon it, for the choice of the commissioner to represent the county in parliament, having himself the casting or decisive voice in the event of an equality \*.

We have already seen, that severe penalties are imposed, in order to prevent undue practices in calling the roll for the choice of preses and clerk; and, to guard against the like abuses in the choice of the commissioner, it is enacted, that if, in such election, the preses receive the vote of any person who does not stand upon the roll made up by the meeting, he shall for such offence forfeit L. 200 Sterling to any candidate for whom such person shall not have given his vote; and that, if he do not call for, or refuse the vote of any person whose name is upon the roll, he shall forfeit the like sum to the person who has not been called for, or whose vote has been refused, to be recovered in the same summary way with the other penalties inflicted by the statute †.

The law does not require that the person who is chosen commissioner should be present at the meeting for election; but, as the  
trust

presiding officers to know them all, either by their persons or faces, the addition was exceedingly proper.

\* 16to Georgii II. cap. 11. § 13.

† 16to Georgii II. cap. 11. § 13. It is proper here to mention once for all, that, by the last clause of this statute, no person can be subjected to any incapacity, disability, forfeiture, or penalty, imposed by it, unless a prosecution be commenced within one year after such incapacity, disability, forfeiture, or penalty, shall be incurred.



trust oath cannot be put to him in his absence, it is enacted, that, before taking his seat in the House of Commons, he shall take that oath before the Lord Steward of his Majesty's household, or any person authorised by him for that end; and that, if any member elected in his absence shall neglect or refuse to take such oath, his election shall be void \*.

The election being made, and the minutes being signed by the preses and clerk of the meeting, the freeholders have nothing farther to do in the matter. The rest of the business, which is purely ministerial, devolves, *first*, upon the clerk of the meeting, and, *next*, upon the sheriff, whose province it is to return the writ for election to the crown office in Chancery. The duty incumbent upon these officers, and the forfeitures and penalties imposed by the legislature, in order to keep them within the bounds of that duty, and to prevent their abusing the power committed to them, shall be explained in the next chapter.

## CHAPTER

\* 16to Georgii II. cap. 11. § 10.



## CHAPTER VII.

*Of Returns by Clerks and Sheriffs.*

THE representatives of shires, in the parliament of Scotland, received commissions directly from the freeholders, and hence they got the name of Commissioners. By the act 1587, cap. 114. those commissions must have been sealed and subscribed by at least six of the barons; and, by a subsequent statute, 1597, cap. 27. no barons were to be received in parliament, as commissioners from shires, without producing sufficient commissions signed in a full convention of the freeholders, and authenticated by the subscriptions of a great number of those who were present, and by the subscription of the clerk to the meeting. Elections are now, however, verified in a different manner, by the intervention of ministerial officers, over whose conduct the legislature has been particularly watchful.

The meeting of the freeholders being over, their clerk must immediately return to the sheriff the person elected by the majority in the manner above stated \*; and, in case he refuse or neglect to return the person so elected; or return any other person to the sheriff, he, for every such offence, forfeits L. 500 Sterling to the candidate chosen by the majority. The like fine is also imposed upon every person who presumes to act as clerk, though not duly elected, and  
returns

\* 6to Annae, cap. 6. § 5.



returns any other than the person elected by the majority of the freeholders\*.

At the general election in 1741, the Honourable Mr Hume Campbell, and Sir John Sinclair of Longformacus, were candidates for Berwickshire. Mr Hume Campbell, as the commissioner last elected, proceeded to call the roll made up at the last Michaelmas head court; but Sir John Sinclair gave in protests against eleven of the freeholders standing upon that roll, in which he stated objections to their right to vote, and insisted that their names should not be called for the choice of preses and clerk. On the other hand, Mr Carre of Nisbet, who supported Mr Hume Campbell, protested against the votes of fifteen freeholders of Sir John Sinclair's party. Mr Hume Campbell called the roll as it stood, without regard to the protests on either side. The number of voters were sixty-six, of whom thirty-five voted for Sir Robert Pringle and James Pringle, the persons set up by Mr Hume Campbell's party for preses and clerk, and thirty-one for Sir John Hume of Manderston and John Sinclair, who were set up for these offices by the other party. Upon this a separation took place. Each party proceeded to enrol, and strike off, several freeholders; and each elected a member. John Sinclair, the clerk elected by the minority, was prosecuted by Mr Hume Campbell before the court of session, upon the act of the 7th of George II. for having made a false return: That court acquitted him; but their judgment was reversed in the House of Lords, and he was found liable in the statutable penalty of L. 500. The defence made for John Sinclair, and sustained in the court of session, was founded upon the words of the statute, by which the penalty was imposed only upon those who should presume to act as clerks, though not *duly* elected, and *wilfully* return to the sheriff persons not *duly* elected  
by

\* 7mo Georgii II. cap. 16. § 1. 16to Georgii II. cap. 11. § 16.



by the major part of the meeting; and he endeavoured to excuse himself upon this ground, that he thought himself *duly* elected clerk, and considered the merits of the election to be with the person he returned, and, therefore, was not guilty of a *wilful* false return. But to this it was held a sufficient answer in the House of Lords, that, as the whole matter was transacted in Mr Sinclair's own presence, and the attempts of the separating freeholders were so manifestly illegal as to leave no room for any pretence of ignorance, or involuntary transgression, he had undoubtedly subjected himself to the penalty of the statute \*.

The partiality of sheriffs is, in the like manner, guarded against by severe penalties. Upon production of a copy of the roll last made up, extracted and signed by the sheriff-clerk, and of the original minutes of the election of preses and clerk, signed by the commissioner last elected, or, in his absence, by the sheriff-clerk, the sheriff must annex to the writ the return made by the clerk chosen by the majority of the freeholders standing upon the roll so produced to him; and, if he fail to annex such return to the writ, or annex to it a return made by any other person pretending to be clerk to the election, he forfeits L. 500 Sterling for every such offence to the person returned by the clerk, and chosen by the majority of the freeholders, to be recovered in the same summary manner with the other penalties or forfeitures imposed by the statute †.

Besides

\* The act of the 16th of George II. had not then passed; but, in the controverted election for the county of Peebles, between Sir Alexander Murray and Sir James Nasmyth, the House of Commons had, upon the 11th of May 1733, resolved, 'That the right of election of a preses and clerk is in such persons as stand upon the roll last made up by the freeholders at the Michaelmas head court, or at the last election of a member to serve in parliament.'

† 16th Georgii II. cap. 11. § 17.



Besides these forfeitures, sheriffs and clerks who are guilty of making false returns, are liable to be otherwise punished when the matter is brought before the House of Commons. In the case of Berwickshire above mentioned, the sheriff-depute accepted of two different returns, one from the clerk chosen by the majority, and another from John Sinclair, who was chosen by the minority of the freeholders; and, having annexed both returns to the writ, the House of Commons not only ordered the return made by Sinclair to be taken off the file, but likewise resolved, 'That David Hume of Wedderburn, sheriff-depute of the shire of Berwick, having accepted, and returned to the clerk of the crown in Chancery, an indenture of return of a commissioner to serve in this parliament for the shire of Berwick, not being signed by the proper clerk, has acted arbitrarily and illegally, in defiance of the laws of the land, and the privilege of this house; and ordered, that the said David Hume be, for his said offence, taken into the custody of the Serjeant at Arms attending this house \*.'

The law does not require that the subsequent minutes of the freeholders, after the meeting is constituted by the election of a preses and clerk, be produced to the sheriff. He has no concern with the minutes of the election of the member; and is bound to annex the return made by the clerk chosen by the majority of the freeholders standing upon the roll last made up, without the privilege of inquiring whether the person so returned to him was properly elected or not. Though one should be returned to him who is totally disqualified, he must annex that return, provided it be made by the proper clerk. He is a mere ministerial officer: All he has to look to is the election of the clerk who offers him the return, and that he

S f

fees

\* Journals of the House of Commons, Martis 19no die Januarii, anno 15to Georgii 2di regis, 1741.



fees from the roll last made up, and the minutes of the choice of preses and clerk: He has no power to exercise his judgment farther; and, in general, needs only eyes and honesty to teach him his duty, and enable him to fulfil it.

Penal laws, imposing fines and punishment upon persons guilty of statutable offences, ought to be expressed in the clearest and most unambiguous terms, so as to point out with the utmost precision the duty of the ministerial officers, against whom such fines and punishment are levelled, in every possible case, and to remove every room for doubt, whether they have been actually guilty or not of the offences for which they are imposed. This, however, is not altogether the case with that clause of the act of the 16th of George II. which is now under consideration; questions having arisen upon it attended with a good deal of nicety, and on which, it is believed, even lawyers have entertained different opinions. A short account of one case that occurred some years ago shall now be given.

It has been already mentioned, that, at the election for the shire of Cromarty in April 1768, Sir John Gordon, after the book in which the roll last made up was inserted had been taken from him, to prevent his erasing the name of Mr Frazer of Culduthil, produced an extract of that roll, and erased Mr Frazer's name out of that extract. Sir John then proceeded to call the votes for the choice of preses and clerk from that extract: Himself and five others voted Mr Robert M'Intosh to be preses, and George Bean to be clerk; Mr Pulteney, and other five, voted Mr Pulteney preses, and Alexander M'Kenzie, the sheriff-clerk of the county, clerk to the meeting; and Mr Frazer not being called, Sir John Gordon assumed a casting or decisive vote, which he gave in favour of Mr M'Intosh and Mr Bean; after which, in the same character of commissioner last elected, he signed the minutes of their election, and delivered



delivered them to Mr Bean. Upon this Sir John's party proceeded to elect the member to serve in parliament, and gave their votes for him, Mr Pulteney and his friends, though all called upon by the preses, except Mr Frazer, making no answer. They were not, however, idle spectators of what was going on; nor would they acquiesce in these proceedings of Sir John Gordon and his friends. Having gone to another part of the room with the sheriff's book, in which the roll last made up was inserted, and having admitted Mr Frazer, who likewise voted for Mr Pulteney to be preses, and Mr M'Kenzie to be clerk, a minute of their election was made out and signed by Mr M'Kenzie, in the character of sheriff-clerk, and likewise by Mr Pulteney, and all the other freeholders in his interest, after which, they proceeded to make an election of the member to serve in parliament, and unanimously made choice of Mr Pulteney, neither Sir John Gordon, nor any of his party, making any answer when their names were called.

Both clerks made returns to the sheriff, but with this difference, that Mr Bean produced minutes of an election of preses and clerk, signed by the commissioner last elected; whereas the minutes produced by Mr M'Kenzie were only signed by himself as sheriff-clerk, and by the freeholders in Mr Pulteney's interest.

The sheriff annexed to the writ the return made by Mr M'Kenzie, and, in answer to a protest taken against him by Sir John Gordon, gave the following reason for his doing so: 'That, having been present during the course of the election, having heard all the minutes read, and given his utmost attention to the whole proceedings therein for sixteen hours, he made his return in favour of William Pulteney, Esq; according to conscience, the best of his judgment, and, so far as he was able to conceive, according to law.'



Sir John Gordon preferred a complaint to the court of session, and contended, that the sheriff had no power to review or correct the proceedings of the commissioner last elected, in calling the roll for the choice of preses and clerk: That, if the commissioner last elected did wrongfully and improperly refuse the vote of a person standing upon the roll last made up, he thereby subjected himself to the penalty imposed by the statute for such offence; but the sheriff had no power to correct that wrong: That he was a mere ministerial officer, bound to annex to the writ the return made by the clerk chosen by the freeholders: That, in order to discover to him the person so chosen, the law had ordered the minutes of the election of the preses and clerk, signed by the commissioner last elected, or, in his absence, by the sheriff-clerk, to be produced to him: That he was bound to consider these minutes, so authenticated, as *probatio probata* of that fact, and was not at liberty to betake himself either to the evidence of his own senses, or to any other evidence whatever, in contradiction thereto: That the minutes produced by Mr M'Kenzie were entitled to no regard, because they were not signed by the commissioner last elected, although he was present in the court room; and that the sheriff, by refusing to annex the return made by Mr Bean, and by annexing the return made by Mr M'Kenzie, had incurred two several penalties of L. 500 each.

The sheriff, on the other hand, maintained, that, as the law directed him to annex the return made by the clerk chosen by the majority of the freeholders standing upon the roll last made up, he had accordingly done so, Mr M'Kenzie having been chosen to that office by seven of these freeholders; whereas only six had voted for Mr Bean: That he was by no means bound to consider the minutes signed by the commissioner last elected as *probatio probata* that the clerk named in these minutes had been truly chosen by a majority of the freeholders standing upon the roll last made up: That, if the  
law



law had so intended, it would have ordered nothing more to be produced to him; but, as it likewise ordered the production of a copy of the roll last made up, extracted and signed by the sheriff-clerk, so it was apparent that the legislature must have made that order on purpose to enable him the more easily to discover whether the minutes signed by the commissioner last elected were true or false, and whether the person named in these minutes was truly chosen by the majority of the freeholders standing upon that roll: That, if the doctrine pleaded by Sir John Gordon were to be listened to, it would throw the return entirely into the hands of the commissioner last elected, which the legislature certainly never intended; and that, as he, the sheriff, had complete evidence before him, both from what he himself saw passing at the meeting, and from the minutes of election of preses and clerk, signed by Mr M'Kenzie, and seven freeholders standing upon the roll last made up, that Mr M'Kenzie was the clerk chosen by the majority of the freeholders standing upon that roll, he was, in the direct terms of the statute, as well as in conscience, bound to annex the return made by that gentleman.

This, as already observed, was a nice case. On the one hand, if sheriffs are bound to consider the minutes signed by the commissioner last elected, or, in his absence, by the sheriff-clerk, as the only evidence from which they are to discover whose return they may with safety annex to the writ, it is not easy to figure a reason why an extract of the roll last made up should be ordered to be produced to them. On the other hand, it is plain, that the production of that roll may not, in every case, have the effect to shew them whether the clerk named in the minutes signed by the commissioner last elected, or by the sheriff-clerk, was truly chosen by the majority of the freeholders present standing upon it. They may, indeed, by comparing the roll with the minutes, discover whether any person has been allowed to vote who did not stand upon that roll: But, unless these  
minutes



minutes be both fairly and distinctly made up, they may not be able to learn from them whether the persons standing upon the roll, whose names are not mentioned as voters in the election of preses and clerk, were wrongfully omitted to be called; such persons may have been absent from the meeting; they may have been disqualified; or may have refused to take the oath of abjuration; and, unless every circumstance of that kind be mentioned in the minutes, the sheriff may remain in a state of uncertainty whether a person, who, in fact, was legally elected clerk, had been chosen by a majority of the freeholders standing upon the roll last made up. If, however, the minutes be drawn up with proper accuracy and precision, the sheriff can be under no difficulty of discovering the truth. In the particular case now mentioned, the matter was clear from the very minutes signed by the commissioner last elected; as it thence appeared, that Sir John Gordon had actually refused to call one of the freeholders whose name stood upon the roll last made up, and had even erased his name out of the extract of that roll from which he called the votes for the choice of preses and clerk. The court of session, after considering the question with the utmost deliberation, acquitted the sheriff from the complaint that was brought against him \*.

The sheriff, after annexing the return made by the clerk, must next return the writ to *the court whence it issued*, that is, to the crown office in Chancery †. And, by an act of the English parliament ‡, made perpetual by a British statute ||, the clerk of the crown is ordered to enter in a book kept for that purpose, every single or double  
return

\* November 19. 1768, Sir John Gordon *contra* Rose of Kilravock.

† 6to Annae, cap. 6. § 5.

‡ 7mo et 8vo Will. III. cap. 7.

|| 12mo Annae, Stat. 1. cap. 15



return of any member to serve in parliament that shall come into his office, or into his hands, and every alteration or amendment that shall be made by him, or his deputy, in such returns. It is also ordered by these statutes, that all persons shall have access to such book, to search and take copies from it, upon paying reasonable fees; and that, if the clerk to the crown do not enter the returns in his book within six days after they come to his hands, or make any alteration upon them, unless by order of the House of Commons, or give any certificate of any person not returned, or wilfully neglect, or omit, to perform his duty in the premises, he shall for every such offence forfeit to the party aggrieved L. 500, to be recovered in any of his Majesty's courts of record at Westminster, and shall also forfeit and lose his office, and be for ever after incapable of holding it \*.

## B O O K

\* The form of the sheriff's annexing to the writ the return made by the clerk, is to be seen in the Appendix, No. 37.



return of any member to serve in parliament shall come into his office, or into his hands, and every alteration of amendment that shall be made by him, or his agent, or his attorney, it is the duty of the clerk to the crown, to not enter the return in his book.

§ 1. If any member shall have any other business, or shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 2. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 3. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 4. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 5. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 6. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 7. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 8. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 9. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 10. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 11. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.

§ 12. If any member shall be absent from the house, or shall be unable to attend the business of the house, he shall be deemed to have resigned his seat, and the clerk to the crown, shall be bound to enter the return in his book.



## B O O K IV.

### Of the Election of the Representatives of the Royal Boroughs of Scotland.

**I**T has been already mentioned, that, for near a century before the Union, the city of Edinburgh returned two, and each of the other royal boroughs one representative, to the parliament of Scotland; but that only fifteen in all are sent from the cities and boroughs in that part of the united kingdom to the British parliament, the city of Edinburgh electing one, and the others being divided into fourteen different classes or districts, each of which chooses a burghs to represent all the boroughs of which it is composed.

The manner of electing these representatives, and the qualifications necessary to entitle them to be elected, shall be fully considered. But, as the right of election is lodged not in the whole body of the inhabitants, but in the magistrates and town-council of the several boroughs, it will be proper to premise a general account of their constitution, and to consider in what manner these electors come themselves into office, and to take notice of the regulations which the legislature has laid down in order to prevent undue influence, or to remedy abuses committed in the election of such office-bearers.



## CHAPTER I.

*Of the Constitution of Royal Boroughs in Scotland; and of the Annual Election of Magistrates and Counsellors.*

A BOROUGH is a corporate body erected by the Sovereign, and made up of the inhabitants of a certain tract of ground, with jurisdiction annexed to it. Some, by their erection, are made to hold immediately of the Sovereign, others to hold of subjects. Hence arises the distinction between boroughs royal, which, in general hold of the crown \*, and have a representation in parliament, and boroughs of regality, or barony, holding of the Lord of Regality, or Baron. All royal boroughs have, by their charters of erection, power to elect annually such office-bearers or magistrates as are specified in the grant; but, in boroughs of regality, or barony, the election of these officers was sometimes vested in the inhabitants, and sometimes in the superior of whom the borough was held.

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\* This does not hold universally; for, when the Sovereign chose to erect a borough which held of a subject superior into a royal borough, the lands belonging to the burgessees still continued to be held as formerly of such subject, unless he consented to the erection, in order that the lands might, in time to come, hold of the crown, and be subjected to such jurisdiction as might be specified in the charter of erection. Hence we find in the parliamentary ratifications of the charters of several royal boroughs, an express salvo of such lands, lying locally within the erected territory, as were held of a subject superior. But, even in these cases, the borough held of the crown all the privileges and liberties that were granted by the Sovereign in the charter of erection. See *Erskine's Institute*, page 210.; *Hope's Minor Practics*, page 96. § 233.



At what period erections of boroughs came first to take place in Scotland is not certain. They could not be earlier than the introduction of the feudal system. Our historians have chosen to ascribe that to the aera of Malcolm II. who began to reign in the year 1004. But, as there is great reason to believe that the old laws ascribed to that Prince are the production of a much later period, it is at least highly probable, that the feudal investitures by charters were not established in Scotland before the time of Malcolm III. whose reign commenced only a few years before the Norman conquest\*. It has already been observed, that we have no evidence of any charters granted to boroughs older than the days of William the Lion †.

Of old, the Lord Chamberlain had the chief oversight of all the royal boroughs in Scotland. To his court alone the magistrates were answerable for their management; and complaints against them, and all craftsmen, and other burgeses, were laid before that high officer at his airs or circuits. He held, also, a court for falsing of dooms, (*i. e.* reviewing the decrees of magistrates of boroughs), in which he was assisted by commissioners or delegates from the boroughs of Edinburgh, Stirling, Berwick, and Roxburgh, whence it got the name of the Court, or the Parliament, of the Four Boroughs. And, in a parliament held at Perth by David II. in 1348, it was enacted, that, while the boroughs of Berwick and Roxburgh should be detained and held by the English, in whose possession they then were, the boroughs of Lanerk and Linlithgow should be received, and admitted in their place, but that the other two boroughs, upon their returning to the possession of the crown of Scotland, should again enjoy their former privilege ‡.

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\* See Essays on British Antiquities, Essay 1.

† A charter from that Prince, erecting the borough of Ayr, is inserted in the Appendix, No. 38.

‡ Curia Quatuor Burgorum, cap. 2.



The court of the four boroughs was originally held at Haddington; but, by a charter of James II. of the 5th of November 1454, it was appointed to meet, in time to come, at Edinburgh. This charter refers to an act of parliament said to have passed during the reign of James I. which, however, is not on record, or in any of the editions of the statutes\*. It begins thus: 'Jacobus, Dei gratia, &c. Quia serenissimus Princeps Jacobus Rex Scotorum, progenitor noster, cujus animae propitiatur Deus, de avifamento et deliberatione trium regni sui statuum apud Perth, concessit et ordinavit parliamentum quatuor burgorum apud burgum nostrum de Edinburgh annuatim teneri, sicut a temporibus retroactis tenebatur; volumus et concessimus, et presentium tenore concedimus, pro nobis et successoribus nostris in perpetuum, burgenfibus dicti nostri burgi de Edinburgh, et eorum successoribus, ut dictum parliamentum quatuor burgorum in dicto nostro burgo de Edinburgh annuatim pro perpetuo teneatur, et die statuto post festum Sti Michaelis Archangeli cum continuatione dierum omnino inchoetur et observetur. Quare magno Camerario nostro et suis deputatis qui pro tempore fuerint stricte precipiendo mandamus,' &c.

This court was also wont to call commissioners from other boroughs to treat and determine upon matters respecting the good of the boroughs in general†; and hence, in all probability, arose what is

\* In fact, the record of the acts in the time of James I. does not now exist. What we have in the place of that record is only a copy taken from the edition of the acts in the old Saxon character, called the *Black Acts*.

† 'In curia quatuor burgorum tenta apud Stirling, 12mo die mensis Octobris anno Domini 1405, decretum est, quod duo vel tres sufficientes de quolibet burgo Domini Regis, ex ponte Australi aquae de Spey, sint quolibet anno secum commissionem habentes ad dictum parliamentum quatuor burgorum, ubicunque tenendum fuerit, ad tractandum,



is now called the Convention of Royal Boroughs, which was first authorised in parliament by the act 1487, cap. 111. whereby it was ordered, 'that zeirly in time to cum, certain commissares of all burrowes, baith south and north, conveene and gadder togidder anis ilk zeir in the burgh of Innerkething on the morne after St James day with full commissioun; and there to commoun and treate upon the weilfare of merchandice, the gude rule and statutes for the commoun profite of burrowes; and to provide for remeid upon the skaith and injuries susteined within the burrowes; and quhat burgh that compeiris not the said daie be their commissares, to pay the coastes of the commissares five pund: And zeirly to have our Sovereine Lordis letter to distreinzie herefore, and for the inbringing of the famin.' By subsequent statutes the convention was allowed to meet four times in the year at such place as they should think most expedient. For a long time past, they have annually met at Edinburgh upon the second Tuesday of July.

Originally, the magistrates and counsellors of the royal boroughs were elected by a poll of the burgeses; but, by the act 1469, cap. 29. the right of election was lodged in the council, it being thereby enacted, that the old council should choose the new council, and that both should elect the office bearers, such as alderman, bailies, and dean-of-guild. It was also by the same act ordered, that the magistrates and counsellors should continue in office only for one year: But in this respect the statute has not been punctually observed; and there is no general rule, either fixing any certain number of magistrates or counsellors, or laying down any precise mode of election to take place in all the royal boroughs. Each borough has its own particular constitution,

'dum, ordinandum, et determinandum super his omnibus, quae ad utilitatem reipublicae, burgorum universorum dicti Domini nostri Regis, et ad eorum libertates et curiam dignoscuntur pertinere;' *Curia Quat. Burg. cap. 1. § 1.*



stitution, or *set*, as it is commonly termed, the directions whereof ought to be literally obeyed. In some boroughs, the sets have been established by the convention; in others, they have no other authority than ancient usage, which, until it be varied by order of the convention, is equally binding, and necessary to be followed \*.

All boroughs, however, stand upon the same footing in this respect, that the magistrates and counsellors must be annually elected; and, if the election does not proceed upon the particular day fixed by the set of a borough, none can take place until a warrant to that effect be obtained from the King in council †.

The first thing to be done at an election of magistrates and counsellors, is to read the act of the 2d of George II. cap. 24. after which, the

\* The records of the convention are extant since the year 1552. In that year they laid down the method of electing the magistrates and council in each borough. That mode, however, came in many boroughs to be varied by usage. At the time of the Union, it was thought proper that the sets of all the boroughs, as then modelled, either by written establishment, or by practice, should be ascertained. An order was accordingly made by the convention, in 1708, upon the different boroughs, to transmit their several sets, for the purpose of their being recorded in their books; and to that order obedience was paid by all but the boroughs of Nairn, and Dornock, and Inverary, by which it was some how or other neglected.

† The nature of these warrants, and the procedure that takes place in consequence of them, will be afterwards explained.

The law of England was formerly the same. By the common law, corporations were dissolved, in case the mayor, or head officer, was not duly elected on the day appointed in the charter, or established by prescription; but it was enacted by the act of the 11th of George I. cap. 4. that, for the future, no corporation should be dissolved on that account; and ample directions were by that act given for the appointment of a new officer, in the event of there being no election, or of a void one being made upon the charter, or prescriptive day.



the electors take the oaths to government, and go through the several steps of election in terms of the set of the borough.

In political disputes, it is but too frequent to resort to measures which cannot be justified, and to fall upon devices to elude what is understood to be the common law of the land, when it interferes with ambitious views that cannot be gratified by conforming to its dictates. The legislature has therefore found it necessary to make particular enactments for preventing abuses of that kind.

Amongst other devices, it was not unusual for the minority to separate from the majority at the annual election of magistrates and counsellors, and for each party to make a separate election. This produced double sets of office-bearers in the same borough, and frequently occasioned commissions to be given to two different persons, as commissioners for electing a burghers to represent the district in parliament. To prevent this evil in time to come, it was declared by the act of the 7th of George II. cap. 16. § 6. that every election to be made by any magistrates or counsellors, in opposition to the majority, should be, *ipso facto*, void; and that every magistrate or counsellor concurring therein should forfeit L. 100 Sterling to the magistrates and counsellors from whom they so separated, to be recovered by a summary complaint before the court of session, upon fifteen days notice. And, by the act of the 16th of George II. cap. 11. it was more particularly enacted, 'that, at the annual election of magistrates and counsellors, and in all the proceedings previous to the election of the magistrates and counsellors for the succeeding year, it shall not be lawful for the minority of any meeting for election, either of magistrates or counsellors, or deacons, or other persons, who, by the constitution of the respective boroughs, may have votes in the election of magistrates or counsellors, to separate from the majority of those having a right to act by the constitution



‘stitution of the borough, at such meetings, upon any pretext what-  
 ‘soever, nor to make any separate election of magistrates, counsel-  
 ‘lors, or electors; but the minority shall, in all cases, submit to the  
 ‘election made by the majority in all the parts of election; and if  
 ‘any person elected by the minority of any such meeting shall pre-  
 ‘sume to vote in the election of magistrates or counsellors, or in elect-  
 ‘ing the magistrates or counsellors, or in any other step of the election,  
 ‘he shall forfeit the sum of L. 100 Sterling to any one of the majority  
 ‘of such meeting, to be recovered by him in the manner hereafter  
 ‘directed \*.’

The last mentioned statute likewise provides, that no person elect-  
 ed by a minority shall, upon any pretence, presume to act as a ma-  
 gistrate or counsellor; and that every person offending in that respect  
 shall forfeit L. 100 Sterling, to be recovered in the same summary  
 manner, by any of the magistrates or counsellors elected by the  
 majority, who shall sue for the same.

These regulations were introduced to prevent the evil arising from  
 double elections, but were not intended to secure success to the ma-  
 jority, when their proceedings were illegal or constitutional. On the  
 contrary, it was expressly enacted by the first mentioned statute,  
 that it should be lawful to any magistrate or counsellor, who appre-  
 hended any wrong to have been done at an annual election, to bring  
 his action before the court of session, within the space of eight weeks  
 after the election, for the rectification of such wrong, or for the total  
 avoidance of the election, if illegal: And this not being found suffi-  
 cient, a more effectual remedy was introduced by the other statute,  
 which in so many words enacts, ‘that it shall and may be lawful to,  
 ‘and for any constituent member, at any meeting for election of ma-  
 ‘gistrates or counsellors, or of any meeting previous to that for the  
 ‘election of magistrates or counsellors respectively, who shall appre-  
 ‘hend

\* That is, by a summary complaint before the court of session upon thirty days notice.



‘hend any wrong to have been done by the majority of such meet-  
 ‘ing, to apply to the said court of session by a summary complaint  
 ‘for rectifying such abuse, or for making void the whole election  
 ‘made by the said majority, or for declaring and ascertaining the elec-  
 ‘tion made by the minority \*, so as such complaint be presented to  
 ‘the said court of session within two kalendar months after the an-  
 ‘nual election of the magistrates and counsellors; and the said court  
 ‘shall thereupon grant a warrant for summoning the magistrates and  
 ‘counsellors elected by the majority, upon thirty days notice †, and  
 ‘shall hear and determine the said complaint summarily, without  
 ‘abiding the course of any roll; and shall allow to the party who  
 ‘shall prevail their full costs of suit ‡.’

This statute limits the time for preferring a complaint to two ka-  
 lendar months after the annual election, and these must be compu-  
 ted from the last step of that election, although the wrong complain-  
 ed of should have been committed at a more early period, and with-  
 out the two months §. It may, however, be asked, What is to be  
 done if the court of session do not sit till these two kalendar months  
 be expired? This can rarely occur; but it actually happened in the  
 year 1765. The annual election of the borough of Pittenweem was

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held

\* There is here an inaccuracy of expression, which ought, of all things, to be avoid-  
 ed in statutable regulations. To talk of declaring, or ascertaining, the *election* made by  
 the minority, seems inconsistent with the former part of the statute, which expressly  
 forbids the minority to make any election, and enjoins them, under severe penalties, to  
 submit in all things to the majority. The intention of the legislature would have been  
 better expressed had this part of the clause run thus, ‘or for declaring and ascertaining  
 ‘the persons voted for by the minority to be duly elected.’

† This notice is now restricted to fifteen days by the act of the 14th of Geo. III. cap. 81.

‡ 16to Georgii II. cap. 11. § 21.

§ In some boroughs the different steps of the annual election take up several days;  
 in Edinburgh several weeks.



held in that year upon the 10th of September. The court of session not meeting till Tuesday the 12th of November, it was impossible, taking the words in a strict literal sense, that a complaint could be presented before the lapse of two kalendar months. To remove this seeming block in the way, the persons who were dissatisfied with the proceedings at the election, lodged their complaint with one of the clerks of court, upon Saturday the 9th of November, and, upon the same day, put printed copies of it into the boxes of the several judges: And although it was keenly urged that no complaint could be presented in the time of vacation, when the court neither was, nor could be sitting, that objection was over-ruled \*. But, if the election had happened a few days sooner, and the two kalendar months had expired before the Saturday, which was the day for putting into the judges boxes those petitions that were to be moved in court at their first diet, no complaint could have been received. This might have been remedied, by allowing complaints, in such cases, to be preferred to the Lord Ordinary officiating on the bills, or by prolonging the time to the first diet of the court after the annual election.

When a complaint, or even a more formal action of reduction, is brought by a minority, for the purpose of getting an election set aside or corrected, all the magistrates and counsellors must be made parties, either as complainers or respondents. The omitting to call any one of them is fatal †: Nay, a misnomer has been held sufficient to cast a complaint, although the counsellor to whom it applied was so described as to leave no sort of doubt of his being the person meant to be called. In a complaint for setting aside the election of the magistrates

\* December 14. 1765, Peter Ramsay and others *contra* Thomas Martin and others. This judgment was affirmed by the House of Lords, February 7. 1766.

† See February 18. 1755, Peter Gillies and others *contra* Allan Waugh and others. See also case of Elgin, 1771.



strates and counsellors of the borough of Anstruther Easter, made in 1765, the minority erroneously prayed for a warrant to serve it, amongst others, upon 'Thomas Brown wright there, and one of the pretended counsellors of the said borough for the present year;' whereas the name of the counsellor alluded to was not Thomas, but George. The mistake was discovered before the complaint was served upon him; and both the copy of the citation given to him, and the execution returned by the messenger, bore, that he had been erroneously named Thomas in the complaint. It was, however, objected, that, as there was no warrant to cite George Brown, he had been called into court without authority, and therefore was not bound to answer. The court sustained the objection, and dismissed the complaint, in respect that all the parties were not called \*.

The two kalendar months had expired a considerable time before this judgment was pronounced. There was therefore no possibility of preferring a new complaint under the authority of the statutes. But the minority conceiving, that, by these statutes, no alteration had been made upon the mode of proceeding at common law, in the form of an action of reduction, instituted a suit of that sort. This suit was received by the court of session, no objection having been stirred to its competency; and the election was accordingly reduced by that court. The decree was, however, reversed by the House of Lords †, who dismissed the action upon this single ground, that the mode of obtaining redress pointed out by the election statutes, was the only one that could be followed, these statutes being intended by the legislature as a separate code in matters of that kind, and a line being thereby drawn, beyond which litigation should not be carried

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\* January 1766, Alexander Young and others *contra* Andrew Johnston and others.

† 1767.



ried on in any mode or form. An action of reduction is still competent, as well as a complaint; but it must be brought within the time limited by the statutes.

The court of session decided a different question very lately upon the same principle. The annual election of the magistrates and counsellors of the borough of Wigton, in the year 1781, was unanimous, and all those who had been in office the preceding year were continued, except one gentleman, whose place was supplied by another. No fault was found with this election by any of the constituent members of the meeting; no complaint could therefore be preferred under the authority of the statutes; but an action of reduction, for the purpose of having it set aside, upon various grounds, was brought within the space of eight weeks, at the suit of two private burghers, who, by their summons or declaration, also insisted for the observance of certain regulations in time to come. No objection was made to the competency of the action, *quoad* these regulations; but the magistrates and counsellors, who were called as defenders, contended, that, in so far as it concluded for a voidance of the last election, it was utterly incompetent, in respect that the statutes had allowed actions or complaints to that effect to be brought only by magistrates or counsellors, or by constituent members of the meeting for election. The court sustained this objection, and acquitted the defenders from that conclusion of the suit by which it was sought to void the election \*.

The statute of the 16th of George II. authorises complaints to be brought by any constituent member *at* the meeting for election. These words seem to exclude those who did not attend the meeting from

\* July 1782, Cowan and M'Guffock *contra* the magistrates and counsellors of Wigton.



from the privilege of complaining: But the court of session sustained a complaint against the election of the magistrates and counsellors of St Andrews made in the year 1745, although the complainers were not present, holding it to be a sufficient title that they were constituent members of the council \*. The statute seems indeed to use the words *at* and *of* promiscuously; for it talks of constituent members *of* any meeting previous to the election.

Summary complaints are only authorised on account of wrongs done at an annual election, or at a meeting previous thereto. Elections which may take place during the course of the subsequent year, for the purpose of filling up places in the magistracy or counsel, vacated by death or otherwise, cannot therefore be made the subject of such complaints †.

In some boroughs, the deacons of the trades ‡ are members of the town-council *ex officio*. In others they are not. In the former, it is clear that the election of a deacon, though made by his own corporation only, may be challenged by a summary complaint, under the authority of the statute: But it is a different question, whether the elections of deacons, who are not necessarily members of the council, can be tried in that manner. Some cases shall be mentioned where that question occurred.

When

\* June 4. 1747, Counsellors of St Andrews *contra* the Magistrates.

† February 28. 1754, Glas and others *contra* the Magistrates of St Andrews.

‡ In most of the boroughs in Scotland there are subordinate corporations of the different trades or companies. An officer is chosen annually to preside at the meetings of these respective corporations: He has in all questions a casting or decisive vote, and is called the Deacon of the trade.



When there is a contested election of a deacon, the magistrates of the borough try the question in the first instance. In a controverted election of the deacon of the weavers in the borough of Inverkeithing, the magistrates, on account of the irregularity, tumult, and disorder, that took place at the meeting, refused to sustain the election of either of the candidates. Upon this, the candidate declared by the minutes of the meeting of the trade to have been elected, preferred a summary complaint to the court of session, by which he insisted that his election should be sustained. This complaint the court at first dismissed as not competent under the statute, reserving it to the complainer to demand redress in the ordinary course of law. They then considered the magistrates to have acted in a judicative capacity, and thought that relief against the unjust sentence of a judge could not be asked in the way of a summary complaint; but, upon reconsidering the question, which was again brought before them by a reclaiming petition, the judges were of opinion, that, although the magistrates had acted in a judicative capacity, yet the case fell within the statute, the alledged wrong, of which complaint was made, having been done by the magistrates at a previous meeting to that for the election of magistrates and counsellors. They, therefore, sustained the competency of the complaint \*, but dismissed it upon the merits, and gave to the magistrates their costs of suit.

There are four subordinate corporations in the borough of Rutherglen. The deacons are not members of the town-council *ex officio*, but

\* August 1. 1777, Bell *contra* Magistrates of Inverkeithing.

There is an apparent hardship in condemning magistrates in costs of suit for a mere error in judgment. This, however, must be the case when their decree, in a contested election of a deacon, is overturned in a complaint before the court of session; the statute having expressly enacted, that, in all complaints brought under its authority, the court shall allow to the party which prevails full costs of suit.



but each corporation gives in to the magistrates a list of a certain number of their body, out of which the magistrates choose a smaller number to be counsellors for the subsequent year. In making out the lists given in to the magistrates, the deacon of each trade has a casting vote. Disputes having arisen with respect to the election of some of these deacons, complaints were preferred to the court of session, under the authority of the act of the 16th of George II. The competency of these complaints was objected to, in respect that the deacons were not constituent members of the council, or of the meeting for electing magistrates and counsellors. But the court was of opinion, that the statute extended to every step of the annual election, and to every previous meeting connected with it; and although, in that borough, the deacons were not members of the council, they were considered to have a share in the election of the counsellors, because they presided in their corporations, and had a casting vote in the making up of the lists out of which the magistrates were to choose counsellors \*.

The wrongs or abuses that may give rise to complaints under the authority of the statute of the 16th of George II. are of various sorts; and it must depend upon the particular nature of such abuses, and upon the influence they may have had, whether they will have the effect to operate a total reduction of an election, or only to set aside certain steps of it.

Elections of all kinds ought to be free. Whatever, therefore, deprives an elector of the freedom of his voice, is an abuse. Force or violence is, of course, a good ground of complaint. It was accordingly decided in the case of the magistrates and town-council of Inverkeithing, that the votes of certain deacons, given at the foot of the

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\* June 19. 1777.



the stair leading up to the court room, ought to be reckoned in the same manner as if they had been given in council, these deacons having been forcibly debarred from entering the room \*. And in a later case from the same borough, force proved to have been used upon the part of the majority, was held sufficient to annul the election made by them †. The effect of force by one party, even though only upon one of the other party, has been pleaded to the effect of annulling an election, notwithstanding that the vote of the person detained by such force from attending the meeting would not have been sufficient to cast the balance. In support of this plea, it has been said, that it is not a person's vote only, but also his weight and influence, and the effect his reasoning may have with others, that ought to be taken into the scale; that objections might be known to him of which every other person was ignorant; and that the terror diffused by the exercise of force, although applied only to one, might operate strongly on others, and check the freedom of their voices. But this reasoning is perhaps too refined. The force ought to operate so far as to disqualify all those who were in any degree accessory to it; but one may doubt the propriety of carrying it farther ‡. At the time of the annual election in the borough of Dumfries in 1759, the public, and ordinary place of election, was occupied

\* January 29. 1745, Mr John Cuningham and others *contra* Sir Robert Henderson and others. See also the case of Montrose, to be mentioned in the sequel.

Sir George McKenzie, in his Observations, page 468. mentions a determination of the parliament of Scotland, finding, 'that a person was capable to vote, albeit he was  
' detained prisoner by a misinformation from one of the competitors, he having given  
' an account of the way and manner of his imprisonment to the meeting, and declared  
' his vote to them, and, after his enlargement, did immediately take the test, and sign  
' the commission.'

† March 11. 1761, Captain Haldane and others *contra* Admiral Holburn and others.

‡ See, however, Kilkerran's Decisions, page 591.



pied by a mob, and many of the counsellors were confined by that mob. In these circumstances, the court of session sustained an election made by the remaining members of the council, privately assembled.

Threats ought to have the same effect, provided they be of such a nature as to give a just ground of fear; for then they are equivalent to force; and the way-laying of electors, and the enticing them, by drinking, or otherwise, to keep away from an election, are likewise just grounds of complaint \*.

Certain persons are also debarred from voting in elections of magistrates and counsellors, because their situation creates a violent presumption of their being liable to influence. These are town servants, pensioners, and beidmen †. Honourary burgeses are also excluded by the same authority. It was once contended, that colliers, on account of the state of servitude in which they were then placed, ought not to be allowed to vote in borough elections; but this plea was repelled by the court of session ‡.

The most frequent of all abuses in borough elections is bribery, which, notwithstanding the anxious and repeated endeavours of the legislature to prevent it, is but too often practised, to the imminent

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corruption

\* See Kilkerran's Decisions, page 591.

† Act of convention 1689, cap. 22. This act was calculated for a particular period; and the regulations it laid down were ordered to be observed only at elections then to take place. But it has been understood to be declaratory of the common law. Beidmen are those who belong to an hospital or public charity. Pensioners exclude all who receive an allowance, either from the community of the borough, or from the church session.

‡ January 16. 1747, Burgeses of Rutherglen *contra* Leith. Kilkerran, page 123.



corruption and destruction of the morals of a great part of the body of the people.

To mention all the different complaints which have been brought upon the head of bribery, and to state the particular circumstances with which each case was attended, would fill a large volume. It will suffice to offer a few observations, and lay down some general principles, leaving it to the reader to consult the particular instances that have been determined, and to form his own opinion how far the proof brought in such cases was sufficient to justify the judgments they received.

Bribery is practised in many shapes, but may, notwithstanding, be properly enough reduced to two different kinds, viz. money given, or other good offices done, or promised, for the behoof of a corporation in general, or given, done, or promised, to individual electors in particular.

Of the former there have been many instances. Money has been given for the purchase of a town clock, for erecting public edifices, or for paying the debts due by a borough: And even promises of that kind, although never performed, but seemingly retracted, have been held sufficient to reduce an election. It is enough that the promise has had, or is presumed to have had, an influence upon the votes of the electors. Two remarkable cases shall be mentioned.

Upon the death of the late Sir Harry Erskine, who represented the district of Pittenweem, Anstruther Easter, Anstruther Wester, Crail, and Kilrenny, several candidates appeared; but they all soon quitted the field except two, Sir John Anstruther of Anstruther, and Mr Robert Alexander merchant in Edinburgh. It was of the utmost consequence to both candidates to get a set of magistrates and coun-

fellors



fellors in the several boroughs, at the annual election in September 1765, in whom they could confide. Sir John Anstruther's interest prevailed in the boroughs of Anstruther Easter and Crail; but Mr Alexander was successful in the other three boroughs of Anstruther Wester, Kilrenny, and Pittenweem. Each party accused the other of having had recourse to bribery and corruption; and complaints were accordingly preferred to the court of session for setting aside the election of magistrates and counsellors made in each of the five boroughs.

In the complaint respecting the borough of Pittenweem, no proof was brought of bribes having been given to individuals; but it appeared to the court, that, before the annual election, a bargain or agreement had been entered into with a leading man in the magistracy, in behalf of the corporation, by which the town's debt was to be paid, provided the town-council should elect a commissioner, or delegate, to vote for Mr Alexander in the election of the burghers to serve in parliament for the district; and, although it was strongly maintained upon the face of the evidence, that the bargain was only to hold in the event of the council's being unanimous, and of the oath of bribery introduced by the act of George II. not being put at the election of the commissioner; that the council were not unanimous; that the oath of bribery was put at that election; and that, in fact, the town's debt had not been paid; the court found, 'that the election of magistrates and counsellors of the borough of Pittenweem, made on the 10th day of September 1765, was brought about by the means of bribery and corruption, and therefore found the same void and null, and reduced, decerned, and declared, accordingly \*.'

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It

\* January 28. 1767, Peter Ramsay and others *contra* Thomas Martin and others. This judgment was affirmed in the House of Lords, March 27. 1767.



It was held a sufficient answer to the defence, that the delay of performing the agreement, by paying the town's debt, was owing to the impending bribery oath; that the treaty had operated as effectually as if it had been actually carried into execution; and that although, in order to make way for the taking of the oath, it was given out that the bargain was at an end, it was still understood by the magistrates and counsellors that the agreement was to be fulfilled, and the town's debt paid, as soon as it could be done with safety.

The other case happened soon after. Two candidates having started for the district of Haddington, Jedburgh, Dunbar, Lauder, and North Berwick, before the general election in 1768, it was of the utmost consequence to secure an interest in Jedburgh, whose turn it was to be the presiding borough, and, in the event of an equality of legal votes, to have the casting, or decisive voice. With that view, the brother of one of the candidates, who probably supposed that there was nothing criminal in making a present to the corporation, if he abstained from bribing individuals, had, upon the 6th of November 1766, granted two acceptances, one for L. 1250, for the use and behoof of the town, and another for L. 250, for the use and behoof of the trades of that town. These acceptances were made payable to two of the then magistrates of the borough, who, upon receiving them, granted an obligation, importing, that, if the borough should not give its vote for Captain Maitland, the brother of the acceptor,

Before the election 1765 was voided, a new election had been made at Michaelmas 1766. The fate of the latter depended upon that of the former. It was complained of within the time prescribed by the statute; and the complaint was laid over till the merits of the election 1765 were determined; when the court, in respect of their judgment voiding that election, likewise voided the other. The appeal was taken against both decrees. What the consequence would have been, if it had been neglected to complain of the election 1766 within two calendar months, shall be afterwards considered.



ceptor, at the ensuing general election, they should be returned: And, of the same date, an act of council passed, and was entered in the council books, of the following tenor: ' Which day, we the magistrates and council of the borough of Jedburgh, subscribing, being fully in council assembled, and taking into our consideration, that several candidates have offered themselves to represent our district of boroughs next parliament, and we having a special regard for the Honourable Captain John Maitland, who has suffered in the service of his country, and has offered himself as a candidate, we do therefore unanimously declare, that we are resolved to support him with our interest at next general election, as we judge him a proper person to represent our district of boroughs in parliament; and we have ordered our clerk to give him an extract of this our resolution accordingly.'

Soon after this, and upon getting advice that the transaction was illegal, the acceptances were delivered up, and the obligation, which had been granted by the two magistrates to whom they were made payable, was restored. This notwithstanding, a complaint was preferred to the court of session, for the purpose of voiding the subsequent election of magistrates and counsellors, which took place at Michaelmas 1767. This complaint was founded upon the transaction with regard to the bills; and, although it was pleaded, *imo*, That it had no relation whatever to the election of magistrates and counsellors, but only respected the vote of the borough at the election of the member to serve in parliament; and, *2do*, That it had been done away immediately upon its being discovered that it was illegal; the court sustained the complaint; and, upon a proof being brought of the facts, they voided the election\*.

This.

\* March 11. 1768, James Alexander and others *contra* Thomas Winterup, and others.



This species of bribery, by giving or promising something to a corporation in general, must always produce a total reduction of the election. The same must likewise be the case when a majority of the electors are bribed. But what will be the consequence, if only a few individuals are bribed, and a majority of uncorrupted electors join with them in voting for the same magistrates and counsellors? In such a case, it cannot be said that the election has been brought about by undue influence. It should therefore seem hard to deprive those of their freehold who had acted *bona fide*, or to disfranchise the borough (which is the necessary consequence of a total voidance of an annual election) on account of the transgression of a few of the former council. It is highly just and reasonable to lay aside the votes of the corrupted, whether bribers or bribed; but, if there still remain a majority of sound votes in favour of the election, it ought not in justice to be affected by their offences. This point occurred in the case of Brechin in 1726. In the election of new counsellors for the ensuing year, the votes stood six to four. One of the six immediately acknowledged that he had been bribed by one of the persons elected, and that an obligation had been taken from him to vote accordingly. Upon this ground the minority insisted in a total reduction of the election, as brought about by bribery and corruption; but the court of session confined the challenge within proper bounds, and only 'found bribery relevant to annul the votes of the bribers and bribed\*.' The same principle was assumed in determining a complaint brought against the election of the magistrates and counsellors of the borough of Kilrenny made in 1765 †.

\* January 14. 1727.

† January 1767, David Fowler and James Miller *contra* Andrew Boyter and others.



But, if the magistrates elected by the majority are liable to be set aside on account of bribery, or upon any other ground, the whole election must, of necessity, fall to the ground, because there can be no council without a magistracy, there being no longer a possibility of exercising that jurisdiction which is inherent in, and essential to, the constitution of a borough. In the case of Inverkeithing, determined in 1761, the constituent members, in the first step of election, were twenty-five, of whom fourteen voted on the side of Admiral Holburn's party, and eleven on the side of the party in the interest of Captain Haldane. The latter challenged the election made by the former, as the majority, on the heads of force and bribery; and, at the same time, insisted, that the persons voted for by themselves should be declared duly elected. The force being proved, and bribery being brought home to a few of the majority, the election made by them was totally set aside; but, as the minority had voted Captain Haldane, who was proved guilty of bribing, to be provost, and two persons who had been bribed to be bailies, all the three were held to be disqualified, and, of course, the election, according to the votes of the minority, could not be declared\*.

It has been maintained, that a bribe given to a wife to prevail with her husband to vote in a certain way, should have the effect to set aside the vote of the husband, although totally ignorant of the bribe given to her. But this seems to be unjust. The person who gives the bribe may be disqualified; but it were hard to forfeit the husband's right on account of an offence of his wife, to which he had no acceffion.

We

\* March 11. 1761, Captain Robert Haldane and others *contra* Admiral Francis Holburn and others.



We have seen, that, by the statute of the 2d of George II. certain penalties, disqualifications, and disabilities, are imposed not only upon those who receive or take money, or other reward, but even upon those who ask it for their votes in elections of members of parliament. Hence it has been made a question, Whether, in the annual elections of magistrates and counsellors of boroughs, the votes of those who ask a reward, but do not receive it, ought to be set aside? But, although a person who does so, discovers a corrupt inclination, still he cannot be said to be actually corrupted, unless he receive; and, although he vote for the person from whom he asked, it cannot be maintained that he did so from undue influence, after meeting with a refusal. Besides, as all penal laws ought to be most strictly interpreted, so the statute now in question relates only to the elections of members of parliament, or of commissioners for choosing burgessees, but not to the elections of magistrates and counsellors of boroughs; and, even in the oath which this very statute requires to be taken by voters, at elections of members of parliament, no mention is made of asking; neither is there a single word relative to asking in the oath introduced by the act of the 16th of George II. which includes the case of money or promises given for the benefit of a borough, as well as money given, or promises made, to particular electors \*.

It has been frequently set up as a defence against complaints for reducing elections made by a corrupt majority, that the complainers were

\* These observations are, however, delivered with much diffidence, a great judge having expressed a different opinion upon the point, in a question relative to the reduction of an election of magistrates and counsellors some years ago. If, indeed, any circumstances appear from which it may be gathered that the refusal was only made in order to guard against an objection, and that the asker trusted to the honour of the candidate, and understood that his request would still be complied with, the case will be different from that here meant to be stated: There he acts under an undue influence, and, on that account, his vote may, perhaps, with justice be laid aside.



barred from insisting, *personali exceptione*, by being themselves equally guilty of corruption. A defence of that sort ought not, however, to be sustained. The law allows every constituent member of the meeting to complain; the complaint must therefore proceed, and the election, if the fruit of bribery, must be set aside. The corruption of the complainers will, however, prevent the persons voted for by them from being declared duly elected.

It has been made a question, Whether any of those who are called as defenders to a complaint, for setting aside an election of magistrates and counsellors, can be brought as witnesses on the part of the complainers? and the court of session has frequently decided that they may be cited, and must give evidence with regard to what they know of others; but that they are not obliged to discover what may infer turpitude against themselves \*. Neither complainers nor respondents can, however, cite any of their own party, or their near relations, as witnesses. This was attempted in the case of Inverkeithing, but disallowed by the court †. And, in the case of Anstruther Wester, *anno* 1766, certain depositions were laid aside, because they were emitted by persons so nearly related to some of the respondents, as to prevent them from being witnesses for them in ordinary questions of civil right, although the facts to be proved by them tended not to exculpate those particular respondents with whom they were so connected. The court considered them all as embarked in one bottom, and at least connected together in the article of costs, which, by the statute, must be paid by the losing party ‡.

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\* See Kilkerran's Decisions, page 599.

† March 4. 1761.

‡ See Select Decisions, page 318. Hunter *contra* Robb.



Before leaving this subject, it will be proper to take notice of a case that was somewhat different from any of those that have hitherto been mentioned. In August 1772, three leading members of the town-council of the borough of Stirling entered into a written agreement, or bond, by which they bound themselves to unite their interests, and to stand by each other, during their lives, in all matters relative to the government of the borough: That each of them should bring in an equal number of friends into the merchant council, or as nearly so as possible: That they should share equally in the disposal of L. 20, or L. 25, to be paid annually by the town-clerk; and that the profits of any office procured to any of them, by any member of parliament, should be equally divided amongst them. This agreement, though kept secret for some time, transpired soon after the annual election of the magistrates and council in 1773, upon which the several duplicates of the bond were destroyed. This notwithstanding, the court of session, in a complaint brought for the purpose of getting that election set aside, pronounced the following decree: ‘Repel the objection to the title of the complainers; and find it proven, that James Alexander, Henry Jaffray, and James Burd, entered into the bonds, or obligations, mentioned in the complaint; and find, that the said bonds were illegal, unwarrantable, *et contra bonos mores*, and that the same had an undue influence on the election of magistrates and counsellors of the borough of Stirling, made at Michaelmas 1772, and also upon the election of the said magistrates and counsellors at Michaelmas 1773, the election complained of; the Lords, therefore, find the said election at Michaelmas 1773 void and null; and reduce, decern, and declare accordingly; and find the complainers entitled to full costs of suit, of which ordain an accout to be given in \*.’ And this decree was affirmed in the House of Lords †, by whom a similar judgment had been pronounced

\* March 1. 1775, John Paterfon and others *contra* James Alexander and others.

† November 8. 1775. The reader will find in the Appendix, No. 39. a judgment of



nounced more than forty years before, in a case from the borough of Kinghorn, where thirteen of the magistrates and council had entered into a contract, upon the 3d October 1732, by which they bound themselves, 'conjunctly and severally, each under the penalty of 500 merks, and of being esteemed infamous, and unfit for society, to act in concert with one another, and to give their votes plum, at the election of magistrates, (which was to come on the next day), to such persons as the major part of them should think most worthy for managing the burgh till the next election at Michaelmas 1733, and then to stand by one another, without any difference or dissent, and to vote plum with one another, not only for such persons as the major part of them should judge proper, but also to vote out such members of the council as the major part of them should think fit; and to stand by and assist one another to the utmost of their power, not only in the choice of council and magistrates, but in every other case whatsoever; and that the cause of any one should be held as the cause of the whole.'

The statute of the 16th of George II. allows only two kalendar months for preferring a complaint against wrongs done at an election of magistrates and counsellors. It sometimes happens that complaints preferred in due time cannot be determined before a new annual election has taken place: What, then, is to be done if it shall be neglected to complain of such new election within the two kalendar months? Will it become void upon a reduction of the former election being obtained; or, have the complainers against the former election any longer an interest to prosecute their complaint? These are nice questions. On the one hand, if an annual election can only be challenged under the authority of the statute, the second elec-

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of the privy council of Scotland respecting the election of the borough of Stirling, which, as a matter of some curiosity, has been taken from the council records.



tion must stand good, although made by persons, who, being themselves unduly elected, were not legally qualified to elect. On the other hand, as the statute allows complaints only to be preferred by constituent members of the meeting for election, so, if none of the complainers of the former election are of that body, and all those of whom it was composed agree to stand by one another, no complaint of the second election can be made, and a wrong will exist for which there is no remedy, unless it be understood that the second election must fall, *ipso jure*, upon the reduction of the first. In the case of St Andrews, the court of session proceeded to reduce the election made in 1745, after a subsequent election in 1746, against which no complaint was preferred within the time allowed by the statute, although it was pleaded that the complainers had no longer an interest to quarrel the first election. The court was of opinion, that, although the election 1746 could not, after the space of two kalendar months, be quarrelled for any wrong done at that election, yet if the election 1745 should be reduced, it would still be competent to challenge the election 1746 at common law, for want of power in the electors \*. A similar judgment was lately pronounced in a case respecting the borough of Jedburgh †.

In some boroughs, the set declares what number of magistrates and counsellors is necessary to make a quorum; and, if that number do not attend, there can be no election. In other boroughs, whose set is silent upon that head, it is understood that a majority of the body is requisite to enable them to proceed to business of any kind: So, at least, the court of session determined in the case of St Andrews, where an election was voided upon that ground, although certain of  
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\* February 19. 1747, Mason and others *contra* Magistrates and Town-council of St Andrews.

† 1783, Marshall and Dick *contra* Kerr, &c.



the electors, who, with those that did attend, would have composed a majority of the whole body, wilfully absented on affected pretences \*.

When an election of magistrates and counsellors is reduced, or, by reason of disturbances in the country, or some other cause, is not made at the usual time, no new election can take place until the King grant a warrant for that purpose. By the law of England, a writ for a poll is granted *ex gratia* only, and cannot be demanded; but, in Scotland, it is understood that it may be asked as a matter of right. The distinction may be thus accounted for: Upon the dissolution of a corporation in England, the grant by which it was established falleth entirely, and the lands, or other property it enjoyed, return to the grantor; and as, by the common law, the omitting to elect the mayor, or head officer, on the proper day, dissolved a borough, it was in the King's will to restore it again or not. But, in Scotland, the reduction of an election, or the neglecting to make one upon the proper day, does not dissolve a borough entirely. Its property remains still with it; and the court of session, upon an application from the inhabitants, names guardians or managers to take care of its revenue, and authorises some person to give infeftments to the different burghage holders. It cannot, indeed, meet for election, but it is not extinguished, and is therefore understood to have a right to demand of the King to authorise it to meet for that purpose.

These warrants are of different kinds, according to his Majesty's pleasure at the time. Sometimes the burghesses and residing heritors, in general, are allowed a poll election; at other times, the last magistrates and counsellors are appointed to name the new magistracy and

\* July 29. 1747, Mason and others *contra* Magistrates and Town-council of St Andrews. Kilkerran's Decisions, page 107.



and council; and, in the case of the town of Perth, in 1716, the power of nomination was committed to the former magistrates alone, without the concurrence of the council.

In 1745, there was no election of magistrates and counsellors made in the borough of Montrose, the rebels being then in the possession of that part of the country. Upon the 16th of June 1746, a warrant was granted by his late Majesty in council, ordering the magistrates and counsellors for the former year to proceed, upon the 10th of July then next, to the election of others, in the same manner they ought to have done if they had not been prevented by the rebellion, and appointing the persons so to be elected to serve till the ordinary time of the annual election. Before the diet appointed for the election came, three of the former council were apprehended on suspicion of having been guilty of treasonable practices, and committed to the prison of Perth, in virtue of a warrant issued by the late Duke of Cumberland, and, by their absence, the party which otherwise would have been the minority carried the election. This appeared from the declarations of the imprisoned counsellors, which was produced at the election; and a complaint having been preferred to the court of session, setting forth, that the warrant for imprisonment had been impetrated upon a false information, fraudulently exhibited to his Royal Highness, in order that these three electors might be detained from the meeting, and therefore praying that the election made by the majority should be reduced, and the persons voted for by the complainers declared duly elected, an objection was moved to the jurisdiction of the court, and it was pleaded, that, as the election had been made in virtue of a warrant from the King in council, its validity was not cognisable in any court of law. In answering this objection, it was admitted, that, when the King appoints a poll election, and names commissioners to take the poll, and to make a report to his Majesty in council, the courts of law cannot interfere;



feré; but it was pleaded, that the case was very different when his Majesty simply authorised the former council of a borough to name a new council, that being, in effect, only a prorogation of the diet of election. This distinction was approved of by the bench, where it was observed, that, in the particular case then before the court, the old council were not made judges, but electors, which entirely distinguished it from that of a poll election, where certain persons are appointed commissioners to take the votes of those who claim to poll, and to judge how far such persons have a right to vote in terms of the warrant. It was likewise in that case objected, that summary complaints were only competent against annual elections; but to this it was thought a sufficient answer, that the meaning of the term *annual election*, is the general election for a particular year, although not made at the ordinary time\*.

The legality of the crown's authorising an election to be made by the former magistrates and council, or in any other way than by a poll, may, however, be doubted. We have already seen, that, of old, all borough elections were by poll; and, although that was altered by the act 1469, cap. 29. it should seem, that, when there is no magistracy and council subsisting, the burghesses at large ought to enjoy their ancient right. It was accordingly observed by one of the judges, in the case of Montrose, that the warrant from the crown, to the magistrates and council of the former year, to make the new election, had been ill advised, and that, as the crown could not refuse the corporation a warrant to meet for election, neither could it grant such warrant otherwise than according to the rights of the corporation, that is, by a poll election, the right being in the burghesses, by the lapse of the day for the meeting of the council to choose their successors†.

When

\* February 17. 1747, James Coutts, and others, *contra* David Doig and others.

† Kilkerran's Decisions, page 106.

Upon



When a warrant is granted for a poll election, it is generally directed to the sheriff of the county within which the borough lies, and to the sheriffs of two neighbouring counties \*.

## CHAPTER

Upon the 5th of April 1689, an act of the convention of estates passed, authorising and requiring the town clerks of Edinburgh to convene all the burgeses who bore burgage duty, and were liable to watching and warding within the city, (with the ~~exclusion~~ of honorary burgeses, town servants, pensioners, beidmen, and the like), upon the 10th of the month, for the purpose of giving in lists of twenty-four persons for magistrates and counsellors, and appointing the magistrates and counsellors then to be chosen to continue in office until the first Tuesday after Michaelmas, when a new election of magistrates, counsellors, and deacons of crafts, was ordered to proceed in conformity with the set of the borough. This act proceeds upon the recital, 'that  
' great invasions had been made of late years upon the privileges of the royal boroughs,  
' and particularly upon those of Edinburgh, in the election of their magistrates, by re-  
' commendations and nominations made by the late King, in an arbitrary and despotic  
' way, contrary to the laws of the kingdom, so that the present magistrates and coun-  
' cil were not true magistrates and council, freely elected, but plainly such as had been,  
' at least by progress, imposed by the foresaid court methods and practices;' *Records of Parliament.*

\* The reader will find a copy of the warrant for a poll election in the borough of Anstruther Wester in the Appendix, No. 40.



## CHAPTER II.

*Of the manner of Electing the Representatives of the Boroughs.*

**T**HERE is a difference between the mode of electing a citizen to represent the city of Edinburgh, and that of electing the representatives of the fourteen districts into which the other boroughs are classed. The latter shall be first considered.

Each sheriff to whom a writ is issued must, immediately upon its coming to his hands, indorse upon its back the day he receives it; and, within four days after, he must make out a precept to each borough within his jurisdiction, reciting the contents and date of the writ, and commanding each of them to elect a commissioner, and to order such commissioner to meet at the presiding borough of the district (which must be named in the precept), upon the thirtieth day after the *teste* of the writ, or the next day, if it fall upon a Sunday, for the purpose of choosing a burgess to serve in parliament. The sheriff must likewise cause these precepts to be delivered, within the four days, to the chief magistrates residing in the boroughs for the time; and, if he neglect his duty in these particulars, he, for every offence, forfeits L. 100 Sterling to any magistrate of the borough whose precept has not been timeously delivered, who shall sue for it \*.

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\* 6to Annae, cap. 6. § 5. 7mo Geo. II. cap. 16. § 5. 16to Geo. II. cap. 11. § 40.  
A form of a sheriff's precept is to be found in the Appendix, No. 41.



The magistrate to whom the sheriff's precept is delivered, must, in like manner, indorse upon its back the day it comes to his hands, and, within two days after, must call a meeting of the council of the borough, by giving notice personally, or leaving notice at the dwelling-house of every counsellor then residing within it \*; and, in case he neglect to do so, he, for every offence, forfeits L. 100 to any magistrate or counsellor of the borough who shall sue for it †.

The council being assembled in consequence of this notice, appoint a peremptory day for the election of a commissioner to go to the presiding borough of the district to choose a burgess to serve in parliament. Two free days must intervene between the meeting of council which appoints the diet for electing the commissioner, and the day on which such election is to be made ‡.

The first step at the election of the commissioner is to produce and read the precept from the sheriff, after which the act of the 2d of George II. cap. 24. is likewise publicly read. The magistrates and counsellors then qualify to government, by taking and subscribing the oath of allegiance, and subscribing the assurance, and by taking and subscribing the oath of abjuration, if put by any member of the meeting.

This being done, the clerk of the borough takes the following oath, which is administered to him by any of the magistrates, or, in their absence, by any two of the council: 'I A. B. do solemnly swear, that I have not, directly or indirectly, by way of loan, or other device whatsoever, received any sum or sums of money, office, place, or

\* 7mo Geo. II. cap. 16. § 5. 16to Geo. II. cap. 11. § 41.

† 16to Geo. II. cap. 11. § 42.

‡ 16to Geo. II. cap. 11. § 42.



‘ or employment, gratuity or reward, or any bond, bill, note, or any  
 ‘ promise of any sum or sums of money, office, place, employment,  
 ‘ or gratuity whatsoever, either by myself, or any other to my use  
 ‘ or benefit, or advantage, to make out any commission for a com-  
 ‘ missioner for choosing a burghess; and that I will duly make out a  
 ‘ commission to the commissioner who shall be chosen by a majority  
 ‘ of the town-council assembled, and to no other person. So help  
 ‘ me God \*.’

The following oath must likewise be taken by every member of  
 the meeting, if required by any one of them: ‘ I A. B. do solemnly  
 ‘ swear, that I have not, directly or indirectly, by way of loan, or  
 ‘ other device whatsoever, received any sum or sums of money,  
 ‘ office, place, employment, gratuity, or reward, or any bond, bill,  
 ‘ or note, or any promise of any sum or sums of money, office, place,  
 ‘ employment, or gratuity whatsoever, either for myself, or any  
 ‘ other to my use or benefit, or advantage, or to the use, benefit, or  
 ‘ advantage, of the city or borough of which I am a magistrate,  
 ‘ counsellor, or burghess, in order to give my vote at this election.  
 ‘ So help me God †.’

These preparatory steps being over, the magistrates and counsel-  
 lers present at the meeting give their votes; and these votes being  
 severally marked by the clerk, the minutes conclude by the council  
 declaring the person in whose favour the majority stands to be their  
 commissioner, and by their ordering the clerk to draw up a com-  
 mission to such person, and to sign it, and to affix to it the common  
 seal of the borough ‡.

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\* 16to Geo. II. cap. 11. § 35.

† 16to Geo. II. cap. 11. § 34.

‡ A form of a commission is in the Appendix, No. 42.



The legislature has found it necessary to guard against abuses, on the part of clerks of royal boroughs, not only by oaths, but by the terror of severe penalties. It was accordingly provided by the act of the 16th of George II. that, if the common clerk of any borough shall neglect or refuse duly to make out and sign a commission to the commissioner elected by the majority, and affix thereto the seal of the borough, or shall make out and sign a commission to any other person, or affix the common seal of the borough thereto, he shall, for every such offence, forfeit L. 500 Sterling to the commissioner elected by the majority, and shall also suffer imprisonment for the space of six kalendar months, and be for ever after disabled to hold or enjoy the office of common clerk of the borough as effectually as if he were naturally dead \*.

This statute also imposes the like penalty of L. 500 upon every person, other than the common clerk of the borough, who takes it upon him to act as such in the election of a commissioner to choose a burgess to serve in parliament, and makes out and signs, or affixes the seal of the borough to a commission in favour of any other person than the commissioner appointed by the majority †. This penalty is likewise given to the commissioner elected by the majority; but, if the commission be made out to him, although signed by another person than the clerk of the borough, no penalty is incurred. Such commission may, however, with propriety, be objected to at the election of the burgess to serve in parliament.

It is not necessary that the commissioner be a resident, or a trafficking merchant within the borough, or that he be in possession of any

\* 16to Georgii II. cap. 11. § 30.

† 16to Georgii II. cap. 11. § 30.



any burgage lands or houses holding of it; nor need any such qualification be engrossed in the commission\*.

The commissioners from the several boroughs of the district meet together upon the thirtieth day after the *teste* of the writ, or, on the day following, if it fall upon a Sunday, in the town-house of the presiding borough, betwixt eleven and twelve before noon, and, after production of the precepts from the sheriffs, and reading the act of the 2d of George II. the commissioner from the presiding borough administers the oaths to government to the common clerk of that borough, who acts as clerk to the meeting, and makes the return to the sheriff. The clerk next takes the following oath: 'I A. B. do solemnly swear, that I have not, directly or indirectly, by way of loan, or other device whatsoever, received any sum or sums of money, office, place, employment, gratuity, or reward, or any bond, bill, or note, or any promise of any sum or sums of money, office, place, employment, or gratuity whatsoever, either by myself, or any other to my use, or benefit, or advantage, to make any return at this election of a member to serve in parliament; and that I will return to the sheriff (or steward) the person elected by the major part of the commissioners assembled, whose commissions are authenticated by the subscription of the common clerk, and common seal of the respective boroughs of this district. So help me God †.' If the clerk neglect or refuse to take this oath, he becomes disabled from acting as clerk to the meeting, and the commissioners are, in that event, empowered and required to choose another clerk, who becomes immediately invested with all the powers and authority in the meeting, and in returning the member chosen by that meeting, which by law are competent to the clerk of the presiding borough ‡.

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\* 16to Geo. II. cap. 11. § 29.

† 16to Geo. II. cap. 11. § 35.

‡ 16to Geo. II. cap. 11. § 36.



The clerk being thus properly qualified to act, the commissioners produce their respective commissions, which are read; and, if objections be made to any of them, or any protests are taken, these objections or protests ought regularly to be made part of the minutes. If any person to whom no commission has been granted, in the manner mentioned in the oath taken by the clerk, appear, and insist that he was duly elected a commissioner from any borough of the district, he must be admitted to the meeting, and, upon his taking the oaths required by law, which the clerk is impowered to administer, and declaring for whom he would have voted, if he had got a commission properly authenticated, the clerk must insert such declaration in the minutes. This is ordered, that, in case of any unfair dealing in making out the commissions, it may be known in the House of Commons, in the event of a petition, for whom the commissioner appointed by the majority of the town-council would have voted, had the clerk of the borough performed his duty, by making out, signing, and affixing the seal of the borough to a commission in his favour. But the clerk of the presiding borough, who is the returning officer, is not left at liberty to pay any regard to such declaration, how much reason soever he may have to be convinced that the person who makes it was truly chosen by the majority of the council, and that it was through the malversation of the clerk alone that he was prevented from producing a proper commission. His office is merely ministerial. He has no power to correct the abuses of others, or to judge what is right or wrong in their conduct. He must literally adhere to the dictates of the statutes, and is prohibited to admit the votes of any but those who produce commissions authenticated by the subscriptions of the common clerks, and the common seals of the boroughs within the district. He must return to the sheriff the person elected by the major part of the commissioners assembled, whose commissions are so authenticated; and, if he neglect or refuse to return such person, or if he return any other person, he, for



for every such offence, forfeits L. 500 Sterling to the candidate elected by the majority, and is also subjected to imprisonment for six calendar months, and for ever after disabled to hold or enjoy his office of clerk of the presiding borough, as if he were naturally dead \*.

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\* 16to Georgii II. cap. 11. § 30.

A case shall be here mentioned, which, although it never received a determination, was the subject of much conversation at the time it occurred. In the election of a burges to serve in parliament for the district composed of the boroughs of Anstruther Easter, Anstruther Wester, Pittenweem, Crail, and Kilrenny, upon a vacancy occasioned by the death of Sir Harry Erskine in 1765, three of these boroughs were in the interest of Mr Robert Alexander merchant in Edinburgh, and the other two in the interest of Sir John Anstruther. Of the boroughs which favoured Mr Alexander, Pittenweem was one; and, at the election of a commissioner from that borough, seventeen members of the town-council voted for him, and three only for Mr Durham of Largo; but all the twenty signed an order to Anderson, the clerk of the borough, to make out a commission immediately in Mr Alexander's favour. A commission to him was accordingly extended, and signed by the clerk, in the presence of the council; but, when he was desired to affix to it the common seal of the borough, he pretended that it had been abstracted from him. Upon this, the council knowing that Anderson and his family were strongly attached to Sir John Anstruther, and suspecting that some trick was intended, caused him affix to the commission an impression of the town's seal, which was then taken from a blank burges ticket for that purpose. The seal of the borough, which had been put into the hands of one of Sir John Anstruther's friends, was soon after restored to the magistrates; but Anderson having absconded, and kept out of the way, the magistrates and council did, upon the 16th of January 1766, deprive him of his office, as guilty of breach of trust, and, at the same time, appointed William Walker to be clerk in his place. Walker accepted of the office; and, having taken into his custody the seal of the borough, and the records of the council, he was ordered to extract from the minutes of election, and to give out to Mr Alexander, one or more commissions, if required, and to sign such commissions, and affix to them the seal of the borough. He was likewise ordered to affix that seal to the commission in Mr Alexander's favour which had been signed by Anderson. That was accordingly done; and, in order to remove all pretence for cavil or dispute, a second extract or commission was likewise made out from the minutes of election, and was signed and sealed by Walker in the presence of the council.

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The commissioners from the several boroughs, before proceeding to the election of a burges to represent the district in parliament, must

The meeting of the commissioners for electing the burges to serve in parliament was held at Anstruther Easter, which was the presiding borough, upon the 17th of January 1766. Mr Alexander attended, and, producing both commissions, voted for himself. The commissioners from Anstruther Wester and Kilrenny likewise voted for him; and the commissioners from the other two boroughs voted for Sir John Anstruther. No other commission was produced from Pittenweem, but several objections were made by the commissioner from the presiding borough, to both the commissions produced by Mr Alexander. To these it was answered in general, that the clerk of the presiding borough was bound by his oath, and the duty of his office, to sustain the vote of every person who produced a commission, authenticated by the subscription of the common clerk, and by the seal of the borough by which such commission was granted; and that, as Mr Alexander had undoubtedly produced a commission so authenticated, his vote could not be rejected. This notwithstanding, the commissioner from the presiding borough claimed a casting or decisive vote, as if there had been an equality, and having given that vote in favour of Sir John Anstruther, James Christie, writer in Edinburgh, who only two days before had been appointed clerk of the presiding borough upon the resignation of the former clerk, (whose scruples could not be overcome, notwithstanding his having received favours upon former occasions from Sir John Anstruther's family), thought proper to return Sir John to the sheriff, who, in conformity with his duty, annexed that return to the writ.

Mr Alexander not only petitioned the House of Commons, but also preferred a complaint to the court of session against Christie, upon the clause of the statute of George II. above taken notice of. He was, however, afterwards prevailed with, through ministerial promises and intrigue, to withdraw his petition; and the complaint against Christie was not prosecuted. But every person who will take the trouble of perusing the printed pleadings in that case must be satisfied, that Christie, either wilfully, or from gross ignorance, had been guilty of making a false return, and had, of course, subjected himself to the penalty, imprisonment, and disqualification, inflicted by the statute on such offenders.

During the course of this complaint, the court of session, upon the application of Mr Alexander, and upon his making oath that he believed Christie to be *in meditatione fugae*, granted a warrant to apprehend him until he should find bail *judicio fisci*. But, upon its being



must take the oaths to government, and likewise the oath of bribery introduced by the act of the 2d of George II. if so required; after which they give their votes; and the minutes being signed by the preses and the clerk, the meeting is thereupon dissolved.

It has already been mentioned, that, by an act of the parliament of Scotland in 1707, it was ordered, that, when the votes of the commissioners of boroughs, met to choose representatives from their several districts, should be equal, the president of the meeting should have a casting or decisive vote, besides his vote as commissioner of the borough from which he was sent, and that the commissioner from the eldest borough should preside in the first meeting, and the commissioners from the other boroughs in the district preside afterwards, by turns, in the order they were called in the rolls of the parliament of Scotland \*. By the British statute, 6to Annae, cap. 6. it was likewise enacted, that, in the case of a vacancy happening during the time of parliament, by death or disability, the borough which presided at the election of the deceased, or disabled member, should preside at the new election. No provision was, however, made with respect to the casting vote, in the event of the commissioner from the presiding borough being absent at the time of election. It was therefore ordered by the act of the 16th of George II. that, if the commissioner from the presiding borough should be absent, or refuse to vote in the election of a burghers, the commissioner from the borough which presided at the last election, and, in the

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being shewn that he had been summoned to attend the House of Commons, the warrant was recalled, so far as issuing against him as in *meditatione fugae*. He was, however, still ordered to find bail, *judicio fisci*, to the extent of 2000 merks.

\* It appears from the act of the 7th of George II. cap. 16. that mistakes had happened with regard to the order of presiding in the district of Wigton, Whithorn, New Galloway, and Stranraer. They were corrected by that statute.



case of his absence, or refusal to vote, the commissioner from the borough which presided at the election preceding the last, and, in case he should likewise be absent, or refuse to vote, the commissioner from the borough which presided last but two should, in these respective cases, besides his own vote, have the casting or decisive vote in the event of an equality.

There still, however, remained a case unprovided for, and it actually occurred some years ago. We have already seen, that the election of the magistrates and counsellors of the borough of Jedburgh, made at Michaelmas 1767, was set aside by the court of session upon the 11th of March 1768: That borough could not therefore appoint a commissioner for choosing a burghers at the ensuing general election, which took place soon after that period; and, as it was its turn to preside, if it had been in a capacity to name a commissioner, great doubts arose, not only with regard to the place where the election ought to be made, but also whether the commissioner from Haddington, which had been the presiding borough during the former parliament, or the commissioner from Dunbar, whose turn it was to preside next after Jedburgh, should have the casting vote, in the case of an equality, a question of the last importance to the two candidates, Dunbar and North Berwick being in the interest of Colonel Warrander, and Haddington and Lauder in the interest of Captain Maitland.

On the one hand, it was contended, that the borough of Jedburgh was annihilated by the decree of the court of session, setting aside the election of its magistrates and counsellors, and that, of course, the right of presiding devolved on Dunbar, as the next in rotation; and the sheriff of East Lothian was required by that borough to issue his precepts accordingly. On the other hand, it was maintained, that, although the council of Jedburgh was no more, yet the  
borough



borough itself still subsisted; that it must be the place of election, and its clerk the returning officer; and that, in the absence of a commissioner from that town, the right of presiding would belong to Haddington, as being the last presiding borough, in terms of the act of the 16th of George II.

The sheriff of East Lothian, in the precepts which he issued to the three boroughs lying within that county, viz. Dunbar, Haddington, and North Berwick, named Dunbar as the presiding borough; but the sheriff of Berwickshire, within which Lauder is situated, did not name any presiding borough in his precept, and contented himself with requiring the council, to whom it was directed, to name the presiding borough, and the place of election, in the commission to be granted by them.

Each of the boroughs of Haddington and Lauder named commissioners to go to Jedburgh upon the thirtieth day after the *teste* of the writ, and there to elect a burgess to serve in parliament. But, as they understood that Dunbar and North Berwick intended to make an election at Dunbar, they likewise appointed commissioners to go there and vote at such election under protest; and upon the supposal that, if the place of election could be at all altered from Jedburgh, it ought to be held at Haddington, they also appointed other commissioners to attend at that borough, and to make an election there on the same day.

Three elections were accordingly made upon the 11th of April 1768. Commissioners from Haddington and Lauder appeared both at Jedburgh and Haddington, and at both these places elected Captain Maitland to be member for the district. The common clerk of the town of Jedburgh having refused to act, the commissioners chose another to officiate in his place, and the clerk so chosen having re-



turned Captain Maitland, the sheriff of Roxburgh, within whose jurisdiction Jedburgh lies, annexed that return to the writ which had been issued to him from the Chancery. At Haddington, the common clerk of the borough acted, and likewise returned Captain Maitland to the sheriff of East Lothian.

At Dunbar, commissioners attended from all the four boroughs. The commissioners from Haddington and Lauder voted under protest for Captain Maitland, and the commissioners of Dunbar and North Berwick voted for Colonel Warrander. Each of the commissioners from Haddington and Dunbar likewise claimed the casting or decisive vote; but the common clerk of Dunbar returned Colonel Warrander, and the sheriff of East Lothian annexed that return to the writ, without paying any regard to the return made by the common clerk of Haddington.

Captain Maitland preferred a petition to the House of Commons, complaining of the return of Colonel Warrander; but, a compromise having taken place, that petition was withdrawn, and Colonel Warrander sat as member for the district, until his seat was vacated by his accepting a place, when a writ issued for a new election.

Colonel Warrander again appeared as a candidate, but was opposed by Mr Charles Ogilvy, who had obtained the interest of the boroughs of Haddington and Lauder.

Upon this occasion, no commissioners were sent to Jedburgh or Haddington, as at the time of the general election; but, at the meeting for election held at Dunbar, the commissioner from Haddington, who, along with the commissioner from Lauder, voted for Mr Ogilvy, again claimed the casting vote; the common clerk of Dunbar having, however, as formerly, returned Colonel Warrander, the  
sheriff



sheriff annexed that return to the writ. Mr Ogilvy petitioned the House of Commons, and the question having been deliberately tried before a committee named in terms of the act of the 10th of his present Majesty, cap. 16. \*, Colonel Warrander was found to be duly elected †. But, as this was reckoned a nice case, and the resolution

\* Formerly, all controverted elections were determined by the House of Commons, in a full meeting of the house; but, sundry inconveniencies arising from that practice, a new mode of procedure was introduced by the act now quoted, which is commonly known by the name of the Grenville act, and reflects much honour upon the gentleman by whom the bill was brought in. When a petition complaining of an undue election, or return, is presented, which, by an order of the house, renewed at the beginning of every session, must be done within fourteen days after the date of that order, or within fourteen days after any new return shall be brought in, a day is appointed for taking it into consideration; and, how soon there are a hundred members in the house upon that day, the counsel and agents for the petitioner and the sitting member are called to the bar, the doors are then locked, and the names of all the members of the house written, or printed, on distinct pieces of parchment, or paper, being put, in equal numbers, into six boxes, or glasses, the clerk draws them from these boxes, or glasses, alternately, until forty-nine names of the persons then present in the house be drawn. This being done, the petitioner's counsel names one, and the counsel for the sitting member another, from among the members present, to be added to the forty-nine so drawn by lot. The doors of the house are then opened; and lists of the forty-nine members so drawn being given to the parties, or their agents, they immediately withdraw, and alternately strike off one out of the list, until the number be reduced to thirteen; after which, the thirteen so remaining, together with the two members named by the parties, who are called their *Nominees*, are sworn at the table, to try the matter in the petition referred to them, and to give a true judgment according to the evidence. A time is then fixed for the meeting of this select committee, which must be within twenty-four hours of their appointment, unless a Sunday or Christmas intervene; and whatever determination they give is final between the parties to all intents and purposes. For a more minute account of this mode of trying controverted elections, see *Douglas*, vol. 1. page 44. *et seq.*

† Mr Ogilvie's petition, presented on the 19th of March 1771, set forth, 'that, at  
' the last election of a member to serve in parliament for the boroughs of Jedburgh,  
' Dunbar,



tion of the committee on that occasion could not bind future committees, were the question to occur again \*, it was thought proper to fix the point by statute; and it was accordingly enacted by the act of the 12th of his present Majesty, cap. 81. ' That, in every  
 ' election of a burghs to serve in parliament for a district of bo-  
 ' roughs in Scotland, when it shall happen that the election of the  
 ' magistrates and council of the borough which ought to have been  
 ' the presiding borough at such election is reduced and not revived,  
 ' the next borough entitled to preside in turn shall be the presiding  
 ' borough, and the election shall be made at that borough; and the  
 ' commissioner for that borough shall be the president of the meet-  
 ' ing of the commissioners for the election, and have a casting and  
 ' decisive vote, besides his own as commissioner, when the votes of  
 ' the commissioners are equal; and the common clerk of the bo-  
 ' rough shall be the clerk to the election; and every matter and  
 ' thing concerning the election shall be proceeded in as if that bo-  
 ' rough

' Dunbar, North Berwick, Lauder, and Haddington, one of the districts of boroughs  
 ' entitled to send members to parliament, the petitioner, and Lieutenant-Colonel Patrick  
 ' Warrander, stood candidates, and that, by the rotation established by law, Jedburgh  
 ' was the presiding borough, and its commissioner or delegate the preses of the meet-  
 ' ing; and, in absence of the delegate from Jedburgh, the delegate from Haddington  
 ' had the right of presiding; and that the borough of Jedburgh had no delegate at  
 ' the said election, and the delegate from Haddington accordingly presided, and gave  
 ' his casting vote in favour of the petitioner, the number of voices being before equal;  
 ' but the sheriff of the county of Haddington, within which the boroughs of Dunbar,  
 ' North Berwick, and Haddington, lie, having issued his precepts to these boroughs to  
 ' go to Dunbar as the presiding borough, and place of election, a return was thereby  
 ' procured in favour of the said Patrick Warrander, in wrong of the petitioner, who  
 ' was then and there duly elected, and ought to have been returned the burghs accor-  
 ' dingly; and that the return of the said Patrick Warrander is injurious to the peti-  
 ' tioner, and in manifest violation of the laws requiring fair and just elections; and  
 ' therefore,' &c.

\* Upon this point see *Douglas*, vol. 1. page 18. et seq.



‘rough had been the presiding borough in the ordinary course of rotation.’ By the same act, it was farther declared, ‘That the borough which would have been the presiding borough at the election, if the election of the magistrates and counsellors of such borough had not been reduced, shall, when revived by the justice and favour of the crown, have no right or title to be a presiding borough in the election of a burghers to serve in parliament for the district of boroughs of which it is one, until the other boroughs of the district, each in their turn, have successively presided, and that the right devolves upon such borough in the ordinary course of rotation.’

A case which occurred from the district of Wigton, Whithorn, New Galloway, and Stranraer, at the general election in 1774, deserves also particular notice. Upon the 17th of October 1774, the council of New Galloway met, in consequence of proper notice, to fix a day for choosing their delegate or commissioner. They accordingly fixed on the 22d of that month; and, on that day, made choice of Mr Alexander Fergusson, whose commission was regularly extended and accepted. The day for electing the member for the district was the 31st of the month, and, on the morning of that day, a letter from Mr Fergusson was presented to the council, then assembled, dated at Edinburgh, purporting, that it was impossible for him to attend, and therefore declaring, that he thereby resigned his commission, and desiring them to choose another delegate in his room. The commission, which he transmitted along with the letter, was also produced; and the council having unanimously resolved to accept of the resignation, and to proceed to a new election of a delegate, John Newal, Esq; was chosen with the same unanimity, and by the same persons who had previously elected Mr Fergusson, they being all present at both elections. Mr Newal's commission was immediately made out and accepted of; and it having been produced  
by



by him at the meeting for the election of the member, he acted as preses, and gave his vote for William Norton, Esquire. The commissioner from the borough of Stranraer voted also for Mr Norton. The commissioners from the other two boroughs gave their suffrages for Henry Watkin Dashwood, Esq; and there being thus an equality of voices, Mr Newal gave his casting vote for Mr Norton, who was accordingly returned to the sheriff by the common clerk of New Galloway, the presiding borough.

Mr Dashwood preferred a petition to the House of Commons, and, before the committee, insisted; *1mo*, That the precept for the election of a commissioner from the borough of New Galloway having been completely obeyed by the nomination of Mr Fergusson, it became *functum officio*, and the power which the magistrates and town-council enjoyed under it having been exercised by that nomination, was entirely at an end; and, *2do*, That a commissioner, or delegate, being a mere creature of acts of parliament, his election must be in every respect agreeable to these acts; that the act of the 7th of George II. had, in order to prevent surprise, directed that two free days should intervene between the meeting that names the day for electing the commissioner, and the day of his election, but that here there was no previous notice of Mr Newal's election; and, how fair soever the proceedings might have been, the precedent, were it to receive a sanction, would open the door to manifest fraud upon future occasions, since, by taking care to propose for the first commissioner a man agreeable to the majority of the council, but whose intention to resign was predetermined, the chief magistrate might, on the morning of the day of the election of the member, have an opportunity of proceeding without any warning, and with a packed number of counsellors, to choose a new commissioner, contrary to the sense and inclinations of the majority of the electors; that Mr Fergusson, notwithstanding his resignation, still continued to be the legal commissioner;



missioner; and that, as he did not appear at the election of the member, there was no representation of the borough of New Galloway on that occasion; and, of course, he, Mr Dashwood, was chosen by the majority of votes.

To this it was answered for the sitting member, that the statutes relied on by the petitioner were merely directory, and not mandatory; and, therefore, acts substantially right were not necessarily void, because, in doing these acts, the particular modes of proceeding chalked out by these statutes were not followed in every circumstance; that, in cases of election for boroughs in Scotland, where a situation arises not foreseen, or at least not provided for by the legislature, the parties may proceed, according to their discretion, in the manner most consistent with reason and justice; that, in the present case, there was first an election in strict conformity to the statute, but an event having afterwards happened which was not provided for by the legislature, the corporation exercised their discretion, and all those who, on the former occasion, had voted for Mr Fergusson, having also been unanimous in voting for Mr Newal, he was, to all intents and purposes, the commissioner of the same persons; that his act was as much theirs as Mr Fergusson's would have been; and that, as they did not, so no one else had a right to complain of his exercising the office committed to him. The committee determined that Mr Dashwood was duly elected, and ought to have been returned \*.

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\* See this case more fully stated by Mr Douglas, vol. 2. page 181. *et seq.* The argument for Mr Dashwood seems to lead to a similar decision in the case where a borough appoints a new commissioner in the room of one who happens to die between his being named, and the day for electing the member of parliament, especially if there be not time to call a previous meeting to fix another at the distance of two free days. This appears to be a hardship, and ought to be remedied. Might not a borough grant a commission to one person, and, failing his attendance, to another?



The procedure subsequent to the meeting of the commissioners from the several boroughs of the district, is similar to that which takes place in the election of representatives of shires. The clerk of the presiding borough returns the person elected by the majority of the commissioners, whose commissions are properly authenticated, to the sheriff within whose jurisdiction that borough is situated. That return must be annexed by the sheriff to the writ; and, in the event of his neglecting or refusing to do so, or of his annexing to the writ a return made by any other person, he, for every such offence, forfeits the sum of L. 500 Sterling to the candidate returned by the clerk of the presiding borough, to be recovered by him, or his executors, by summary complaint before the court of session \*.

Having thus stated the mode of election that takes place in the fourteen districts, consisting each of several boroughs, it now remains to consider the manner of electing the member for the city of Edinburgh. There the process is much shorter. No commissioner or delegate is necessary; and all the statutable directions applicable to such election are comprised in the following clause of the act of the 6th of Queen Anne, cap. 6. § 5. ‘And as to the manner of election of the fifteen representatives of the royal boroughs, the sheriff of the shire of Edinburgh shall, on the receipt of the writ directed to him, forthwith direct his precept to the Lord Provost of Edinburgh, to cause a burghers to be elected for that city, and on receipt of such precept, the city of Edinburgh shall elect their member, and their common clerk shall certify his name to the sheriff of Edinburgh, who shall annex it to his writ, and return it.’

This part of the act is evidently defective in sundry respects; and none of these defects have been supplied, or even attended to, in any of

\* The form of the sheriff's annexing to the writ the return made by the clerk of a presiding borough is to be seen in the Appendix, No. 42.



of the subsequent statutes relative to the election of burgeses, all of which are applicable only to the districts.

In the *first* place, although the sheriff is ordered *forthwith* to direct his precept to the Lord Provost of Edinburgh, he is subjected to no penalty in the event of his neglecting to do so; whereas the other sheriffs are subjected to a penalty, if they do not cause their precepts to be delivered to the chief magistrate of the several boroughs in their counties within four days from the time of the writs coming to their hands.

*Secondly*, although the Lord Provost is to *cause* a burges to be elected by the city, no directions are given in what manner he is to cause it, or within what time the election is to be made. The act indeed says, that, on receipt of the sheriff's precept, the city shall elect their member; but the city cannot be considered to be in the receipt of that precept until it be delivered or communicated to the magistrates and town-council by the Lord Provost, to whom it is ordered to be directed; and, as no particular time is limited for his doing so, neither is any penalty imposed upon him for withholding it.

*Thirdly*, The common clerk of the city, who is to certify the name of the member to the sheriff, is under no obligation to take any oath for the faithful discharge of his duty. Neither the oath to be taken by the clerk of a borough at the election of a commissioner or delegate, nor the oath to be taken by the clerk of the presiding borough, at the election of a member for a district of boroughs, will apply to the occasion; and, as he does not, properly speaking, *return* the member, but only certifies his name to the sheriff, who is to annex it to his writ, and return it, he is none of those on whom it is incumbent to take the oath prescribed by the act of George II. cap. 24.



It is, however, the constant practice for the common clerk of the city of Edinburgh to take that oath, which is as follows: 'I A. B. do solemnly swear, that I have not, directly nor indirectly, received any sum or sums of money, office, place, or employment, gratuity or reward, or any bond, bill, or note, or any promise or gratuity whatsoever, either by myself, or any other person, to my use, benefit, or advantage, for making any return at the present election of a member to serve in parliament; and that I will return such person as shall, to the best of my judgment, appear to me to have the majority of legal votes.'

*Fourthly*, Neither the common clerk of the city of Edinburgh, nor the sheriff of the county, can be subjected to any of the statutable penalties for making a false return of a member from that city, although, no doubt, either of them, when guilty of that offence, may be otherwise severely punished by the authority of the House of Commons.

The right of electing the members sent from the city of Edinburgh to the parliament was, before the Union, and, consequently, is still in the magistrates and town-council. It has, however, been made a question, Whether that right is confined to what is called the ordinary council, or if the extraordinary deacons have likewise a title to vote. Other questions have arisen from the defect of the statutes in some of the particular circumstances above taken notice of; and, as all these questions were thoroughly canvassed on occasion of the controverted election in 1780, they will be best understood by giving an account of that case; previous to which it will, however, be necessary to mention the general nature of the constitution, or set of the city, as it now stands modelled by two decrees arbitral, the first pronounced by James VI. of Scotland, and the last by Archibald Duke of Argyle, then Earl of Ilay, in consequence of  
submissions



submissions entered into between the mercantile part of the council, of the one part, and the deacons of crafts, and trades counsellors, of the other.

The town-council consists, in all, of thirty-three persons, viz. a Lord Provost, four bailies, a dean-of-guild, a treasurer, an old provost, four old bailies, an old dean-of-guild, an old treasurer, three merchant counsellors, two trades counsellors, and fourteen deacons of crafts, or companies of tradesmen.

The business is, in general, conducted by what is called the ordinary council, which consists only of twenty-five, being composed of the Lord Provost, the four bailies, the dean-of-guild, the treasurer, the old provost, the four old bailies, the old dean-of-guild, the old treasurer, the three merchant counsellors, the two trades counsellors, and six out of the fourteen deacons, who are annually chosen to be of the council; and, by the decree arbitral of James VI. it was expressly declared, that 'the saids provost, bailies, dean-of-guild, 'theasurer, and counsel, electit as said is, makand in the haill twenty-five persons, they only, and na uthers, shall have the full government and administration of the haill common weill of this burgh, 'in all things, as the provost, baillies, and counsel thereof, or of any 'other burgh had of before, or may have hereafter be the lawes, or 'consuetude of this realm, infestments and priviledges grantit to this 'town be our Sovereign Lord's maist noble progenitors; exceptand 'always thir causes following, in the quhilks, the haill fourteen deacons of crafts shall be callit and adjoyned with them to give their 'special vote and consultation thereunto, to wit, in election of the 'provost, baillies, dean-of-guild, and theasurer, as said is; in setting 'of feus, or any manner of tacks, attour the yearly rousing on Martinmas Even; in giving of benefices and other offices in burgh; in 'granting of extents, contributions, emprimits, and sicklike, bigging.

' of



‘ of common warks ; and in disposing of the common good above  
‘ the sum of twenty pound togidder.’ The extraordinary council  
consists of the above named twenty-five, and of the other eight deacons of crafts, who not being members of the ordinary council, are, on that account, termed extraordinary deacons, or deacons not of the council.

The other decree, pronounced by the Earl of Ilay upon the 12th of March 1730, contains the following clause : ‘ And further finds,  
‘ decerns, and declares, that the said extraordinary deacons of crafts  
‘ have right to give their special vote and consultation annually in electing and choosing the members of the dean-of-guild court of  
‘ Edinburgh, but that they have no vote in the election of the officers of the trainbands, the constables, &c. the magistrates and ordinary council having the only right of choosing the said officers :  
‘ But finds, decerns, and declares, that the said extraordinary deacons have a right, and ought to be adjoined with the ordinary council, at least ought to be legally called for that end, when they  
‘ are to proceed to the election of provost, bailies, dean-of-guild, or treasurer, or to set feus, or any manner of tacks, attour the yearly  
‘ rousing on Martinmas Even; or to give benefices and other offices within the burgh ; or to grant extents, contributions, emprimits, and concerning public buildings, or to dispose of the common good above the sum of twenty pounds Scots together. And, further,  
‘ finds the said extraordinary deacons have right to vote in choosing committees for deliberating upon, and preparing all or any of the said matters, and are also capable of being members of the said committees ; and as to the article of commissioners for and from the burgh, which includes a case relating to the privilege of parliament, the same is hereby to receive no determination, of consent, and at the desire of both parties.’

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The same decree likewise regulates the manner in which the council, ordinary or extraordinary, is to be summoned, and ascertains what number is sufficient to constitute a quorum. The words are ;  
' And also finds, decerns, and declares, that the right of calling the  
' council, ordinary and extraordinary, belongs to the provost, or pre-  
' ses of the meeting; and, upon an execution returned of the mem-  
' bers being summoned by the said provost or preses, his order, thir-  
' teen of the ordinary, and seventeen of the extraordinary council,  
' may proceed, and act in the same manner as if all the members  
' were present; but, if the provost or preses shall neglect, or shall  
' refuse to call a council on Wednesday, the ordinary council day, a  
' majority of the said council may, forty-eight hours preceding the  
' ordinary and stated time of meeting, require the aforesaid provost  
' or preses, under form of instrument, to call a council, and, upon  
' refusal or neglect to comply with the demand so made, the majo-  
' rity of the said council may meet on the said usual and stated time,  
' and proceed to do business.'

It is unnecessary to enter into a minute detail of the different steps of procedure in the annual election of the magistrates and council. The fourteen deacons are first elected by their respective corporations or companies, and, upon the next council day, are presented to the ordinary council of the preceding year, who, out of them, choose six to be of the council for the year ensuing, upon which the six old council deacons remove, and have no further concern in the election. The next step is for the remaining nineteen members of the former council, and the six new deacons, to choose three merchant counsellors and two trades counsellors, who, with the then provost, bailies, dean-of-guild, and treasurer, and the provost, bailies, dean-of-guild, and treasurer, to be chosen afterwards, and the six new deacons, are to compose the ordinary council of twenty-five for the ensuing year. This is done upon the Wed-  
nesday



nesday preceding Michaelmas, and, upon the next Tuesday after that feast, the whole business is finished, by the election of the Lord Provost, bailies, dean-of-guild, and treasurer, in which the new council, consisting then of eighteen, and the old council, reduced to twelve, and the eight extraordinary deacons, making in all thirty-eight, are entitled to vote.

A dissolution of parliament took place upon the 1st of September 1780, and the very next day writs were issued from Chancery for the election of members to the last parliament, which was appointed to be held on the 31st of the ensuing month of October.

Upon this occasion two candidates appeared for the city of Edinburgh; Sir Laurence Dundas, the former member, and William Miller, Esq; Advocate. It soon appeared, that, if the election of the member could be brought on before the annual election of magistrates and counsellors should be completed, Mr Miller would prevail; but that, if it could be postponed till after that period, Sir Laurence Dundas would, in all probability, be elected.

The writ issued to the sheriff of Mid Lothian, within which county the city of Edinburgh is situated, did, as usual, contain the following clause: 'We also command you, that, immediately after the receipt of this our writ, you cause your precept to be directed to the Lord Provost of our city of Edinburgh, freely and indifferently to elect for that city, one burghers of the most discreet and sufficient, according to the form of the statutes aforesaid.'

This writ was delivered to the sheriff upon the 8th of September, and, upon the next day, he issued his precept, which, after reciting the writ, and the orders thereby given to him, proceeded as follows: 'Herefore I charge you, Walter Hamilton, Esquire, Lord Provost of  
' the



‘the city of Edinburgh, or *the chief magistrate of the borough there*  
‘*residing* \*, for yourself, and in name of the said city, that ye cause  
‘a citizen and burghers of the aforesaid city, of the most sufficient  
‘and discreet, freely and indifferently to be chosen, &c. and that  
‘you cause return his name to me in certain indentures to be made  
‘betwixt me and the clerk to be appointed for that effect, that the  
‘affairs of the kingdom may not be delayed for want of such per-  
‘son, or through an undue election; and this you in no ways leave  
‘undone, as you shall be answerable.’

This precept was delivered in the forenoon of the 11th of the month to Mr Hamilton, the Lord Provost, who granted a receipt for it to the sheriff-clerk.

The first meeting of the council, after this delivery of the precept, was held, in the ordinary course of business, upon Wednesday the 13th of the same month, when the Lord Provost being absent through indisposition, William Thomson, the first bailie, was chosen preses, and produced the following letter, addressed to him by the Lord Provost, and dated the preceding day: ‘Sir, I have received  
‘the sheriff’s precept, but have not yet resolved as to the day to  
‘which the council shall be summoned for fixing the time of elec-  
‘tion of a member of parliament for this city. I am,’ &c.

James Craig, one of the ordinary or council deacons, and convener of the trades †, then moved, ‘That, as it was acknowledged  
C c c ‘that

\* These words were an addition to the usual form of the precept, and were inserted without any authority from the statute, which simply requires the sheriff to issue his precept to the Lord Provost. Mr Hamilton, who then held that office, had been for some time much indisposed both in body and mind, and had gone to the country, but was brought to Edinburgh before the sheriff’s precept was ready to be delivered.

† The convener of the trades is one of the fourteen deacons, chosen by them to preside in their meetings.



‘ that the sheriff’s precept had been served upon the Lord Provost on  
‘ Monday morning last, and, as there was evidence of that fact be-  
‘ fore the council, and, as the provost had not proceeded in the usual  
‘ manner, according to the law and practice of the borough, by call-  
‘ ing a meeting of council within forty-eight hours after such service  
‘ made upon the provost, on purpose to fix the day of election, there-  
‘ fore, he now moved that the council do meet in this place, at the  
‘ hour of six o’clock this evening, to name a day for proceeding to  
‘ the election of a member of parliament; and that those now present  
‘ be summoned *apud acta*, and those members of the council who  
‘ are absent be regularly cited to attend at the above hour and place,  
‘ for the purpose above mentioned.’

To this motion John Grieve, dean-of-guild, objected on this ground, that the Lord Provost was the person whom the law had entrusted with the execution of the precept issued by the sheriff, and that, as he had not yet issued his own precept for calling a council to fix the time and place for election, the meeting had no power to do so; and he accordingly entered a protest, ‘ that all after proceed-  
‘ ings to be held or taken, in consequence of this meeting fixing or  
‘ appointing a day, hour, and place, for such an election, shall be  
‘ null and void to all intents and purposes; and that all and every  
‘ person, or persons, concerned in any steps thereof, shall be liable in  
‘ the highest pains and penalties.’

Mr Grieve, likewise, by another protest, objected, that the eight deacons not of the council, called Extraordinary Deacons, had no manner of right to vote in the election of a citizen or burghers to serve in parliament, and had still less a title to vote in fixing or appointing a day for that purpose, or in any other preliminary step to be taken about such election; but to this it was answered, that the extraordinary deacons had always been in the practice of voting  
on



on such occasions, and that it appeared from the council records that they had been uniformly cited by the chief magistrate's precept to attend the meeting for fixing the time of election.

The vote being put, 'agree to Convener Craig's motion or not,' ten of the ordinary council, and the eight extraordinary deacons, voted *agree*, and fourteen of the ordinary council voted *not*; upon which Mr Thomson, the preses of the meeting, granted warrant to George Penman, the council officer, to summon the members to attend at six in the evening; but afterwards declared, 'that though, 'in consequence of the vote of the majority of the members of council, he had ordered George Penman to summon the council to 'meet at six o'clock this evening, in terms of the convener's motion, yet, as preses of the ordinary council, he now discharges ' (prohibits) him to put the former order in execution.' Upon this Penman said, 'that, in consequence of this last order, he recalled his 'former summons, and discharged the council to meet this evening.'

Notice of these proceedings was given to the Lord Provost, who was also cited to attend by a messenger at arms, and one of the city officers, and a notary public; but to that notice and citation he paid no regard.

The meeting in the evening was attended by the eighteen persons who had appointed it, but by none of the fourteen who had objected to it. Mr Grieve, indeed, went there for the purpose of protesting against the legality of the meeting, both on account of its not being called by the Lord Provost, and in respect that there were not thirteen members of the ordinary council present, without which number, he contended, there could not be a quorum either of the ordinary or extraordinary council; but immediately after entering

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that protest he withdrew. A protest was likewise taken in the name of the Lord Provost by a gentleman authorised by him.

After making an answer to these protests, Mr Craig produced a notorial (notarial) copy of the sheriff's precept; and evidence being laid before the meeting of the citation given to the Lord Provost to attend, it was unanimously resolved, 'That, upon Saturday next, the 16th current, at ten o'clock in the forenoon, the council should proceed to elect a fit and well qualified burghers to represent the city in the ensuing parliament.' Bailie Leslie acted as preses to this meeting; and, in consequence of directions then given to him, he, the next day, caused the absent members of the council to be summoned to attend.

The eighteen persons, who had thus fixed a meeting for election, having accordingly assembled at the appointed time, Bailie Thomson appeared, and entered a protest against their proceeding; another protest was also entered in the name of the Lord Provost; but to these no regard was paid, farther than by giving them an answer; and one of the conjunct common clerks of the city, who attended upon that occasion, having produced the notorial copy of the sheriff's precept, which had been lodged with him at the former meeting, it was moved, that a deputation should be sent to the Lord Provost, to request of him to transmit the original precept to the meeting. Two of their number went accordingly to his house upon that errand, but returned without getting any other answer to their message, which they made under form of instrument, and delivered to a servant, than that the Lord Provost was in bed, and had no answer to give.

The sheriff-clerk was then called in, and produced the receipt granted by the Lord Provost to the sheriff for the precept; and a duplicate of that precept, certified both by the sheriff and himself to be



a true copy; and these papers being farther verified by the oath of the sheriff-clerk, the meeting proceeded to the ordinary steps of election, and unanimously made choice of Mr Miller; upon which an indenture, certifying his election, was made out between the city clerk and the sheriff, and annexed by the latter to the writ issued to him from Chancery.

By this time, the steps of the annual election of the magistrates and counsellors of the city for the ensuing year had commenced; but they were not completed till the third of October, on which day the Lord Provost, the bailies, the dean-of-guild, and the treasurer, were chosen. By this election, Sir Laurence Dundas acquired a superiority in the council; and, as soon as the ordinary business of the day was over, David Steuart, Esq; the new Lord Provost, produced to the council a letter of that date, from his predecessor in office, addressed, 'To the Lord Provost of Edinburgh to be this day elected,' and of the following tenor: 'Inclosed I send you the principal precept delivered to me by Archibald Cockburn, Esq; sheriff-depute of Edinburgh, requiring me to cause a citizen and burghers to be elected and chosen to represent the city of Edinburgh in the ensuing parliament. I likewise inclose a receipt by George Penman, council and dean-of-guild officer, for the precept issued by me (in consequence of the sheriff's precept) for summoning the town-council to meet on Thursday next, the fifth October, in order to appoint an hour, day, and place, for electing of such member, and who will return the same, with an execution thereof, to you, as my successor in office. I am,' &c. Penman accordingly delivered the late provost's precept, and an execution, bearing his having summoned the members of council to attend, as thereby ordered; upon which, to prevent any dispute on account of his predecessor's going out of office before the object of his precept could be accomplished, the new Lord Provost granted a new warrant in  
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the following terms: 'I grant warrant to the officer to summon, warn, and charge, the ordinary council to meet and convene in this place upon Thursday next, the fifth of October current, at ten o'clock in the forenoon, in order to appoint a day, hour, and place, for electing a burghers to represent this city in the ensuing parliament, agreeable to the sheriff's precept, now delivered to me from the late Lord Provost, and his precept issued in consequence thereof, with the execution of the same; and also, to summon, warn, and charge, the eight extraordinary deacons, not of the council, but which shall not be held as any homologation or acknowledgment of any claim for their having a vote at such meeting.'

Against these steps, protests were entered by Bailie Leslie, and those other members of the new council, who had formerly made an election of Mr Miller. But the council met at the appointed time, to the number of thirty-three, when the Lord Provost moved, 'That, upon Saturday next, the seventh day of October, the council should meet in this place at eleven o'clock in the forenoon, in order to proceed to elect a fit and well qualified burghers to represent the city in the ensuing parliament.'

To this motion Bailie Leslie and others objected, in respect that a burghers had already been elected; but the vote being put, 'agree to the Lord Provost's motion or not,' seventeen members of the meeting voted to agree, and sixteen voted against it.

The council accordingly met again upon the seventh of the month, when, upon production of the sheriff's precept, and after a deal of altercation, and a variety of protests upon both sides, they proceeded to make an election of a burghers to represent the city in parliament. On this occasion there were present thirty-two members of the council; of these seventeen voted for Sir Laurence Dundas, and fifteen



teen voted for Mr Miller, under the following declaration made by each: 'I have already declared that I hold this meeting to be illegal, and any second election unnecessary and improper, for the reasons contained in the protest I have taken; but I also declare, that, if this shall be found a legal meeting, my vote shall be held to have been given in favour of William Miller, Esq; Advocate, to be the representative of this city in parliament; and I do hereby declare and vote for him accordingly \*.' The majority of votes being thus in favour of Sir Laurence Dundas, the minutes bore, 'That the Lord Provost, magistrates, and council, with the deacons of crafts ordinary and extraordinary, did, and hereby do, elect the said Sir Laurence Dundas of Kerse, Baronet, citizen and burghers, to represent this city in the ensuing parliament; and the council did require the said John Dundas, officiating as clerk, to return him accordingly,' &c. This was immediately done. Mr Dundas made out an indenture, certifying Sir Laurence to have been elected, and tendered it to the sheriff, requiring him to enter into and execute it, and annex it to the writ issued to him from Chancery; but with this requisition the sheriff refused to comply, giving for his reason, that he had already returned the writ, with an indenture annexed to it, certifying the election of Mr Miller.

Sir Laurence Dundas preferred a petition to the House of Commons, complaining of the election and return of Mr Miller. Two other

\* It was thought by some a piece of bad conduct in Mr Miller's friends to attend this meeting, knowing, as they did, that they were to be outvoted: But they, at that time, meant to challenge the election of some of the magistrates and counsellors in the interest of Sir Laurence Dundas; and if these should be set aside, they would themselves be the legal majority. They accordingly preferred their complaint to the court of session; but it was dismissed before the merits of the election of the member of parliament came to be tried.



other petitions were likewise put in to the same effect, the one in the name of the magistrates and council as a collective body, the other in the names of certain individuals who had voted for Sir Laurence: And, upon the 16th of March 1781, a committee was named to try the merits of the question.

To enter into every point that was introduced into the argument before the committee would consume too much time. It will suffice to take notice of the most material.

To the election of Mr Miller, it was first objected, that the only statute laying down any regulations respecting the election of the member for the city of Edinburgh, was the act of Queen Anne; that, by that statute, the execution of the sheriff's precept was entirely committed to the Lord Provost, to whom the sheriff was ordered to direct his precept to *cause* a burghers to be elected; and that the stile of that precept was accordingly uniform in requiring the Lord Provost to *cause* a citizen to be chosen, &c. and to *cause* his name to be returned in certain indentures, &c.; that as, in all cases of executive government, some person must be answerable for the execution, so the Lord Provost was alone answerable for the conduct of an Edinburgh election; that it behoved him, at his peril, to take care that the election should be timeously made; but that he was not, like the chief magistrates in other boroughs, bound to take the preparatory steps within any limited number of days; and that no seeming delay upon his part could entitle the council to take the execution of the precept out of his hands, or to assemble of their own accord, either for the purpose of making an election, or in order to fix a day for doing so.

In answer to this, the counsel for Mr Miller, the sitting member, insisted, though but faintly, that, in terms of the acts of the 7th  
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and 16th of George II. it behoved the Lord Provost to call a meeting of the council, to fix the diet of election, within two days after his receiving the sheriff's precept, and that the records of the council shewed this to have been the general practice: But what they seemed chiefly to rely upon, was that part of the act of Queen Anne which says, that, *on receipt* of the sheriff's precept, the city shall elect their member: Hence they contended, that the precept was directed to the Lord Provost only as preses of the electors, and not as, in any respect, a returning officer; that he was a mere instrument, or hand, to receive the precept, and had no title to controul the electors in any point; that they alone had the right of fixing the day of election; and that the Lord Provost's neglecting or delaying to call them together could not prevent them from assembling of their own accord for that purpose; that, from the moment the precept came into his custody, it was in the receipt of the city; and that, of course, the magistrates and council were, from the same moment, at liberty to meet together, in order to fix a day for the election, without waiting till he should think proper to convene them.

In this stage of the argument, it was farther stated by the counsel for Mr Miller, that, in fact, it was Sir Laurence Dundas, and his friends, that had assumed the power of executing the precept, it being notorious that the Lord Provost, whose name they made use of to sanctify their own jobs, had been for a considerable time deprived of his reason. They were accordingly proceeding to call witnesses to prove his situation and state of mind; but the counsel for Sir Laurence Dundas having objected to the committee's going into an inquisition of that sort, especially as the other party had, in the course of their argument, considered that officer as a mere hand, or instrument, requiring no head to direct him in the execution of his duty, the committee resolved that the evidence should not be received.

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The counsel for Sir Laurence Dundas, in the *next* place, objected, that the eight extraordinary deacons had no right to vote in the question brought on in the meeting of the forenoon of the 13th of September, when, by their voices, it was carried to meet at six of the clock in the evening of that day to fix the diet of election; for that, admitting them to have a right to be called, and adjoined with the ordinary council at the election, and to give their votes for the member of parliament, and even supposing it competent to the council, without the concurrence or approbation of the Lord Provost, to call a meeting for fixing the time of election, yet these extraordinary deacons, not being of the council, could have no title to interfere in that business, and thereby to thwart the measures of the majority of the ordinary council.

To this it was answered, that, if the extraordinary deacons had a right to vote in the election, they must, of course, have likewise a voice in every preparatory step respecting it.

The counsel for Sir Laurence Dundas, in the *third* place, contended, that neither the meeting of the evening of the 13th fixing a time for an election, nor the meeting of the 16th of September, at which Mr Miller's election took place, could proceed to any business whatever, in respect that, at none of these meetings, there were present thirteen members of the ordinary council of twenty-five, without which, it was said, there could not be a quorum even of the extraordinary council, although, including the extraordinary deacons, there might be more than seventeen assembled.

This was an important branch of the argument, and was fully discussed. In support of the general position, it was stated, that, by the decree-arbitral of James VI. the full government and administration of the borough was committed to the council of twenty-five,



five, except in some particular cases, where all the fourteen deacons of crafts were to be called, and adjoined to them; that, in like manner, the subsequent decree, pronounced by the Earl of Hlay, had declared, that, when business was to come on in which the extraordinary deacons were allowed a voice, they were to be *adjoined* with the ordinary council, and that this expression necessarily implied, that no such business could be proceeded in without the presence of a quorum of the ordinary council, as, while that was wanting, there could be no ordinary council, and, consequently, no existing body with whom to adjoin the extraordinary deacons; that although, by the Earl of Hlay's award, seventeen were requisite to constitute a quorum in matters of that sort, yet it was not necessary that any determined number of these seventeen should be extraordinary deacons, but it was sufficient that they were called or summoned to attend; and that, although the members of the ordinary council of twenty-five were fined when absent, or late of coming in, yet no such fines were ever imposed upon the extraordinary deacons; that, to suppose there could be an extraordinary council without the presence of a quorum of the ordinary council, would lead to the greatest inconsistency and absurdity; for, upon that supposition, the council of the city of Edinburgh, which, however composed, or for what purpose soever assembled, was certainly at all times to be considered, when acting, only as one body, might be divided into two separate bodies, each of which might legally act at one and the same time; as, while thirteen, nay sixteen, of the ordinary council, were sitting at one end of the council board, for the sake of transacting business falling under their province, and requiring immediate despatch, the eight deacons not of the council, with the other nine members of the ordinary council, might, at the other end of the table, or in another room, hold an extraordinary council, and determine upon matters of the greatest importance; and that, in fact, there was no precedent in the records of the city of a meeting of the council, though



exceeding seventeen in number, proceeding to any business whatever without the presence of thirteen of the ordinary council, nor was any attempt to do so known, except one in 1763, when, on account of the want of that number, the Lord Provost left the chair, and Mr Williamfon, the same clerk who had certified Mr Miller's name to the sheriff, refused to acknowledge the legality of the proceedings, and would not make up any minute of them in his character of city clerk, but only attest them as a notary.

The counsel for Sir Laurence Dundas, in confirmation of this part of their argument, also called as witnesses the chamberlain, and one of the deputy clerks of the city, who concurred in deposing, that they always understood the presence of thirteen of the ordinary council to be necessary to enable even an extraordinary council to proceed to business, and that they never knew an attempt to the contrary but in 1763, which they, however, considered to be of no effect, as the proceedings on that occasion never entered the records of council, and were challenged by a bill of suspension (a bill for an injunction) presented to the court of session.

The answer made by the council for Mr Miller amounted in substance to this, that, as the Earl of Ilay's decree in fixing the quorum made no distinction between the members of the ordinary council and the extraordinary deacons, but simply declared, that, in order to constitute a meeting of the extraordinary council, the attendance of seventeen members was necessary, so it could be of no moment in what manner that quorum was composed, and that the conclusion sought to be inferred from the word 'adjoined,' was a mere criticism, not to be regarded in explaining deeds or writings, where substance was more attended to than accuracy of expression; that it was in the power of all the members of the ordinary council to attend if they pleased upon every occasion, and that business in which  
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the extraordinary deacons had likewise a voice was not to stop on account of the want of any particular number of those to whom the more common and ordinary concerns of the borough were committed; that it was of no consequence that no precedents appeared of business being done when fewer than thirteen of the ordinary council were present, as that only proved the general punctuality of their attendance; and that, although fault had been found with the proceedings at the meeting in 1763, and the clerk had refused to sanctify these proceedings for want of a quorum of the ordinary council, that was not to be wondered at, because it was a disputed point whether the business then in agitation was of that nature that the extraordinary deacons could legally interfere, or take a concern in it, and, upon the supposition that it was a matter in which they could not vote, the presence of thirteen of the ordinary council was without doubt absolutely requisite \*.

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\* The election of a member of parliament for the city of Edinburgh is a corporate act, and each individual magistrate and counsellor votes as a member of the body corporate. Hence the attendance of the same number is necessary in that business that is requisite to constitute a quorum in matters of ordinary administration. Were not this the case, no quorum would be requisite at an election. One of the counsel for Mr Miller did accordingly contend, that each individual member of the council voting in the right of his own freehold, it was of no consequence whether a greater or a smaller number attended; but the other counsel, who had occasion to be better acquainted with the political constitution of the boroughs in Scotland, did not think himself warranted to maintain such a doctrine. He had indeed objected to Mr Grieve's being called as a witness for Sir Laurence Dundas, in respect that, by being a member of the town-council, he was to be considered as a party, in consequence of the petition that was preferred against Mr Miller's election by the magistrates and council in their corporate capacity, although his name did not appear in the other petition that had been presented to the house by individual electors. The commissions given to burghesses sent to the parliament of Scotland were, by an act of the convention of the royal boroughs, in 1642, appointed to be signed by the magistrates, and by the clerk, in the name of the council, and to have the common seal of the borough appended to them. A form of a commission of this sort is to be found in the Appendix, No. 43.



The election of Mr Miller was, in the *fourth* place, objected to, in respect that it proceeded without the precept issued by the sheriff to the Lord Provost, which the counsel for the petitioner considered as the sole authority for making an election. Upon this head reference was made to Lord Coke, who says, 'That any election or voices given before the precept be read and published, are void, and of no force, for the same electors, after the precept is read and published, may make a new election, and alter their voices, *secundum legem et consuetudinem parliamenti.*' The act of the 2d of George II. cap. 24. was also appealed to, which being appointed to be openly read before the electors, immediately after the reading of the writ or precept, shewed, it was said, the sense of the legislature, that no election could proceed without the precept; and it was farther added, that it was of no consequence that a duplicate, or copy, of the precept had been produced, especially by persons to whom it neither was, nor could be directed.

To this it was answered, that the Lord Provost, or those whose tool he was, having wilfully with-held the original precept, for the purpose of preventing the then council from making an election, they were entitled to proceed under the authority of a duplicate of that precept properly verified; and that to dispute that proposition, were to maintain that it was in the power of the Lord Provost alone, in opposition to the unanimous wish and inclination of the whole body of the council, to prevent altogether an election of a member for the city, an absurdity that was repugnant to common sense, and which no law could be supposed to authorise.

The counsel who appeared for the other petitioners, the magistrates and council of the city, likewise objected to the right of the extraordinary deacons to vote in the election of the member of parliament. This point had been left undecided by Lord Ilay's award.



award. Some instances of their voting before the Union appeared on the city records. From that period, downwards, they had constantly exercised that privilege; but, till a few years before this contest, their right to do so had always been objected to by way of protest, which, however, had been omitted at the four last elections.

Upon the supposition that Mr Miller's election was void, no good objection could lie against the election of Sir Laurence Dundas, which was regular in every respect. The committee accordingly, upon the 22d of March 1782, resolved, *1mo*, That Mr Miller was not duly elected; and, *2do*, That Sir Laurence Dundas was duly elected. They also resolved, that, in the election of a member for the city of Edinburgh, the extraordinary deacons had a right to vote; but, although this resolution was communicated to the agents for the parties, it was not reported by the committee to the house.

## CHAPTER



## CHAPTER III.

*Of the Qualifications necessary to entitle a person to be elected a Burgess to serve in Parliament.*

WE have seen that commissioners from shires must be possessed of a freehold within the counties which they represent. There is, however, no necessity that a person who represents the city of Edinburgh, or any of the fourteen districts into which the other boroughs are divided, be possessed of any property within these boroughs.

By an act of the eleventh parliament of James VI. \*, it was ordained, ‘ That there fall be na confusion of persones of the three  
‘ estaites, that is to say, na person fall take upon him the function,  
‘ office, or place, of all the three estaites, or of twa of them, bot fall  
‘ only occupy the place of that selfe estait quhairin he commonly  
‘ preffesses himself to live, and quhairof he takes his style.’ Sir George Mackenzie, in his observations on this act, says †, that the parliaments having grown very factious in the time of Queen Mary, the Popish and Protestant parties contending which should prevail, such of the Popish bishops, or other church dignitaries, as were possessed of lands and heritage, claimed two votes, one as churchmen, and another as barons, and that the first part of this  
statute,

\* 1587, cap. 33.

† Page 236.



statute, prohibiting any person to take upon him the office of all the three estates, or of any two of them, was made to prevent such attempts for the future. He seems, indeed, to have been more diffcult what to make of the latter part of it, but supposes that it was intended to keep barons who could not get themselves sent to parliament from shires from being chosen as burgeses. It may, however, be observed, that, although an act preparatory to the introduction of the representatives from shires had passed in the year 1585, yet the act establishing that representation, although passed in the same parliament, was posterior in point of date to the one now under consideration.

During the 16th century, the convention of royal boroughs made several acts prohibiting any persons from being chosen commissioners from boroughs to the parliament, but freemen, merchants, and traffickers; but this regulation having been at times transgressed, and Charles II. thinking it for his interest to have it revived, he, upon the 3d of July 1674, wrote a letter to the royal boroughs upon that subject, in which, after testifying his resolution to maintain them in their immunities, and mentioning his having received information, that, of late, an innovation had been brought in amongst them by their electing commissioners to parliament, and to their own particular and general conventions and meetings, who were not actual residents within the boroughs by whom they were commissioned, and bore not proportional charges with the inhabitants, nor could lose or gain in any of their concerns, he required them to take special care that their ancient custom in that respect should be revived, and the like abuses prevented for the future\*.

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\* A copy of this letter is in the Appendix, No. 44.



In obedience to this requisition, the boroughs passed an act of convention in July 1675, by which, after mentioning that many inconveniencies had arisen from electing commissioners who were not merchants, traffickers, residents, bearing common burden with the rest of the inhabitants, and could not lose or gain in the concerns of the boroughs, and that such a practice was destructive to the interest of their estate, they ordained, that, in all time to come, none should be elected commissioners by any of the royal boroughs to particular conventions of estates, or to the particular and general meetings of the boroughs, but such as were ‘merchants, ‘traffickers, present residents within the borough commissiona- ‘ting them, and who bore common burden with the rest of the in- ‘habitants, and were such persons who could gain and lose in the ‘concerns of the boroughs.’ By this act, all elections of persons not so qualified were also declared to be, *ipso facto*, void and null. High penalties were likewise imposed upon the voters for unqualified persons, and upon those who, in that situation, accepted of commissions; to all which there was added the following clause: ‘And ‘for the better and more punctual performance and execution of ‘this present act, the convention ordains, that this clause shall be ‘added to the oath *de fidei*, which is to be taken of every burges ‘of every royal borough within the kingdom, at his admission to ‘be a counsellor of their respective boroughs, viz. that he shall not, ‘in time coming, vote, nor consent to the choosing of any person to ‘be commissioner from the royal boroughs to parliaments, conven- ‘tions of estates, and to the general and particular meetings of bo- ‘roughs, but such persons as are qualified in manner foresaid; and ‘farther ordains their common agent, present, or to come, to raise ‘letters of horning thereupon, for charging the haill royal bo- ‘roughs of this kingdom to make their elections of commissioners ‘to parliament, conventions of estates, and to their general and ‘particular conventions and meetings, when the same shall occur, ‘conform



‘ conform to the qualifications foresaid, under the pain of rebellion,  
 ‘ and putting of them to the horn, if they failzie; and sicklike, or-  
 ‘ dains the said agent to raise other letters of horning, charging  
 ‘ every particular person who shall hereafter vote for such unwar-  
 ‘ rantable elections, or such as shall accept of such unwarrantable  
 ‘ commissions, not being qualified as said is, to make payment to  
 ‘ him, for the common use of the boroughs, of the foresaid penalty  
 ‘ of a thousand merks, as oft, and sua oft as they shall transgress thir  
 ‘ presents, and that under the pain of rebellion, and putting of him  
 ‘ to the horn, whereanent thir presents shall be a warrant \*.

In 1681, the borough of Selkirk having chosen Sir Patrick Murray, who did not reside in that borough, to be their commissioner to parliament, a charge was given both to the borough and to Sir Patrick for payment of the penalty imposed by this act of convention; and the matter having been brought before the court of session by a bill of suspension, that court found, ‘ that the town of  
 ‘ Selkirk had contravened the King’s letter, and act of the bo-  
 ‘ roughs made thereon, discharging the boroughs to elect any to  
 ‘ represent them but actual trafficking and residing burghesses;  
 ‘ and found the said acts of boroughs obligatory, and that Selkirk  
 ‘ had incurred the fine.’ This we learn from Fountainhall †, who also informs us, that the parliament which met in that year set aside all the elections of gentlemen for boroughs, unless they were actual residents and traffickers. We accordingly meet in the records of parliament, with a minute of the 5th of August 1681, in the following words: ‘ The report of the committee concerning the  
 ‘ double elections for the borough of North Berwick being read,  
 E e e 2 ‘ debated,

\* A copy of this act of convention is in the Appendix, No. 45.

† Vol. 1. page 148.



‘ debated, and put to the vote, it was found, that no person could  
‘ be elected commissioner to represent a borough in parliament un-  
‘ less he be a burghers, and a residing trafficking merchant in that  
‘ borough, and George Suttie not being so qualified, and Charles  
‘ Maitland, the other commissioner, being a residing trafficking  
‘ merchant in the said borough, the parliament approved the com-  
‘ mittee’s report, and sustained Charles Maitland’s commission, and  
‘ rejected the other.’ Similar resolutions were made the same day,  
respecting the commissioners for the boroughs of Selkirk and Inver-  
keithing \*: None of these regulations were, however, long obser-  
ved. It became customary before the Union to choose lawyers, and  
other learned gentlemen, as commissioners from the boroughs; and  
now no qualification is necessary to entitle one (who is not disqua-  
lified by the statutes mentioned in the fifth chapter of the preceding  
book) to represent either the city of Edinburgh, or any of the four-  
teen districts. It was indeed generally understood, that a person  
who was to represent a district should have been previously admit-  
ted a burghers of at least one of the boroughs of which it was  
composed; but the committee who tried the controverted election  
for the district of Wigton, Whitehorn, New Galloway, and Stran-  
raer, above taken notice of, over-ruled an objection made on that  
ground to the capability of Mr Dashwood to represent that district.

## APPENDIX.

\* In the list of the unprinted acts of the parliament 1681, there is mentioned, ‘ Act  
‘ anent the election of commissioners within boroughs royal for parliaments and con-  
‘ ventions;’ but no such act is to be found either in the records, or in the warrants of  
those records. Perhaps the publisher has in this list only alluded to the resolution  
respecting North Berwick.



debated, and put to the vote, it was found, that no person could be elected commissioner to represent a borough in parliament unless he be a burgess, and a residing trading merchant in that borough, and George Burdett, not being so qualified, and Charles Mainland, the other commissioner, being so, the parliament approved the commissioner in the said borough, the parliament approved the committee's report, and sustained Charles Mainland's commission, and rejected the other. Similar resolutions were made the same day respecting the commission of George Burdett, and Charles Mainland. None of these resolutions were, however, ever carried.

No. I. (Page 22.).

*Indenture between Robert Bruce and the Earls, Barons, Freeholders, and Communities of Boroughs.*

**H**O C est transcriptum indenturae concordatae et affirmatae inter Dominum Robertum, Dei gratia, Regem Scotorum illustrem, et comites, barones, liberetenentes, communitates burgorum, ac universam communitatem totius regni, magno sigillo regni, et sigillis magnatum et communitatum praedictorum alternatim sigillatum, in haec verba: Praesens indentura testatur, quod, quinto decimo mensis Julii, anno ab incarnatione Domini m.ccc. vicesimo sexto, tenente plenum parliamentum suum apud Cambuskenneth, serenissimo Principe Domino Roberto, Dei gratia, Rege Scotorum illustri, convenientibus ibidem comitibus, baronibus, burgensibus, et ceteris omnibus liberetenentibus regni sui, propositum erat, per eundem Dominum Regem, quod terrae et redditus, qui ad coronam suam antiquitus pertinere solebant, per diversas donationes et translationes occasione guerraefactas sic fuerant diminuti, quod statui



fuo congruentem sustentationem non habuerit, absque intolerabili onere et gravamine plebis suae; Unde instanter petiit ab eisdem, quod cum tam in se quam in suis, pro eorum omnium libertate recuperanda et salvanda, multa sustinuiſſet incommoda, placeret iis, ex sua debita gratitudine, modum et viam invenire per quem, juxta status sui decentiam, ad populi sui minus gravamen congrue posset sustentari. Qui omnes et singuli comites, barones, burgenses, et liberetenentes, tam infra libertates quam extra, de Domino Rege, vel quibuscunque aliis dominis infra regnum, mediate vel immediate tenentes, cujuscunque fuerint conditionis, considerantes et fatentes, praemissa Domini Regis motiva esse vera, ac quamplura alia suis temporibus eis per eum commoda accreviſſe, suamque petitionem esse rationabilem atque justam, habito super praemissis communi ac diligenti tractatu, unanimiter, gratanter, et benevole concesserunt et dederunt Domino suo Regi supra dicto, annuatim, ad terminos Sancti Martini et Pentecostes proportionaliter, pro toto tempore vitae dicti Regis, decimum denarium omnium firmarum et reddituum fuorum, tam de terris suis dominicis et wardis, quam de caeteris terris suis quibuscunque, infra libertates et extra, et tam infra burgos quam extra, juxta *antiquam extentam* terrarum et reddituum tempore bonae memoriae Domini Alexandri, Dei gratia, Regis Scotorum illustris, ultimo defuncti, pro ministeriis ejus fideliter faciend. excepta tantummodo destructione guerrae, in quo casu fiet decidentia de decimo denario praeconcesso, secundum quantitatem firmae quae occasione praedicta de terris et redditibus praedictis levare non poterit, prout per inquisitionem, per vicecomitem loci fideliter faciendam, poterit reperiri: Ita quod omnes hujusmodi denarii in usum et utilitatem dicti Domini Regis, sine remissione quacunque cuicunque facienda, totaliter committantur: Et si donationem vel remissionem fecerit de hujusmodi denariis, antequam in cameram Regis deferantur, et plenarie persolvantur, praesens concessio nulla sit, sed omni careat robore firmitatis. Et quia quidem magnates regni tales vendicant



cant libertates, quod ministri Regis infra terras suas ministrare non poterint, per quod solutio, Domino Regi facienda, forsan poterit retardari; omnes et singuli hujusmodi libertates vendicantes Domino Regi manuceperunt portiones, ipsos et tenentes suos contingentes, per ministros suos ministris Regis statutis terminis plene facere persolvi: Quod si non fecerint, vicecomites Regis, quilibet in suo vicecomitatu, tenementa hujusmodi libertatum regia auctoritate, pro hujusmodi solutione facienda, distringant. Dominus vero Rex, gratitudinem et benevolentiam populi sui placide ponderans et attendens eisdem gratiose concessit, quod a festo Sancti Martini proximo futuro, primo viz. termino solutionis faciendae, collectas aliquas non imponet, prisas seu cariagia non capiet, nisi itinerando seu transeundo per regnum, more predecessoris sui Alexandri Regis supra dicti: Pro quibus prisas et cariagiis plena fiat solutio super unguem; et quod omnes grossae providentiae Regis, cum earum cariagiis, fiant totaliter sine prisas: Et quod ministri regis, pro omnibus rebus ad hujusmodi grossas providentias faciendas, secundum commune forum patriae, in manu solvant, sine dilatione. Caeterum, consensus est et concordatum, inter dominum regem et communitatem regni sui, quod, ipso Rege mortuo, statim cesset concessio decimi denarii supradicti: Ita tamen, quod de terminis praeteritis, ante mortem ipsius Domini Regis, plenarie satisfiat. Et quod nec per praemissa, vel aliquod praemissorum, post hujusmodi concessionem finitam, haeredibus dicti Domini Regis, aut communitati regni sui, aliquatenus fiat praejudicium; sed quod omnia in eundem statum redeant et permaneant, in quo erant ante diem presentis concessionis. In quorum omnium testimonium, uni parti hujus indenturae penes dictos comites, barones, burghenses, et liberetenentes residenti, appositum est commune sigillum regni: Alteri vero parti, penes Dominum Regem remanenti, sigilla comitum, baronum, et aliorum majorum liberetenentium, una cum communibus sigillis burgorum regni, nomine suo et totius communitatis, concorditer sunt appensa. Dat. die, anno et loco



loco supradictis. Et hoc transcriptum penes magnates et communitates praedictos, et eorum successores remansurum, sigillo regni consignatur, in testimonium et memoriam futurorum. Datum apud Edinburgum, in parlamento Domini Regis tento ibidem, secunda Dominica quadragesimae, cum continuatione dierum sequentium, anno gratiae M.ccc. vicesimo septimo.

No. II. (Page 36.).

*Charter by James III. to the borough of Inverness, dated August 16. 1464 \*.*

JACOBUS, Dei gratia, Rex Scotorum, &c. Sciatis, nos quasdam cartas, literas, et evidencias, per quondam nostros inclitos progenitores, Willielmum, Alexandrum, Davidem, et Jacobum primum, avum nostrum, Scotorum Reges, burgo nostro de Invernes, ac praeposito, balivis, et burgen. et communitati ejusd. factas et concessas, de donationibus et concessionibus, immunitatibus, privilegiis, et libertatibus infra scriptis, non raras, non cancellatas, nec in aliquibus earum partibus suspectas, ad plenum intellixisse; et pro parte dictorum praepositi, balivorum, burgen. et communitatis supplicatum humiliter extitit, ut cartas, literas, evidencias, et libertates hujusmodi, a nostris inclitissimis progenitoribus donatas, ne propter earum vetustatem ac sigillorum eorum imbecillitatem, beneficium principum, quod de jure communi debet esse mansurum dicto burgo, consumaretur, innovaremus et confirmaremus. Tenor vero unius cartae dicti

\* The reader will discover in this charter several inaccuracies and grammatical errors, but it was thought proper to copy it literally from the records.



ti Willielmi Scotorum Regis sequitur, sub hac forma, "Willielmus, Dei gratia, Rex Scotorum, omnibus vicecomitibus, balivis totius terrae suae, salutem: Sciatis, me hanc libertatem dedisse burgen. meis de Moravia \*, ut nullus, scilicet, in terra mea eorum namum capiat pro alicujus debito, nisi pro eorum debito proprio; quare prohibeo firmiter, ne quis in terra mea eorum namum aliter capiat super meam plenariam defensionem. Teste Willielmo de Haya, Philippo de Vallon. Ricardo Clerico meo de Prebend. apud Boncle." Tenor vero alterius cartae ejusd. Willielmi Regis sequitur, in his verbis: "Willielmus, Dei gratia, Rex Scotorum, omnibus probis hominibus totius terrae suae, clericis et laicis, salutem: Sciatis, praesentes et futuri, me omnes burgen. meos de Innernefs quietos-clamasse, omni tempore, a tolneo et omni consuetudine, per totam terram meam; quare prohibeo firmiter, ne quis ab eis de eorum dominicis catallis tolneum, aut aliquam consuetudinem, exigat super meam plenariam forisfacturam: Prohibeo etiam, ne quis emat aut vendat in burgo illo, aut in vicecomitatu illo, extra burgum, aliquam mercaturam exerceat, nisi fuerit burgen. aut stallagarius, aut per quantum burgen. hujusmodi fecerit. Dedi etiam et concessi, praedictis burgen. ad sustentamentum burgi, terram illam quae est extra burgum, quae vocatur Burghalew, scilicet, quae est inter montem et aquam, ita quod nullus in ea vannagium aut piscuram habeat, nisi per eorum licentiam. Burgen. vero universi mihi convenerunt, quod cum circa praedictum burgum passatum fecero, ipsi super fossatum totum burgum claudent, bono palitio, et ex quo clausum fuerit palitium illud sustentabunt, et semper bonum et integrum conservabunt. Teste M. Epo Aberdonen. Co-

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\* This shews, that, in those days, there were burgeses without being incorporated. The privilege here given is not restricted to the inhabitants of a particular town or village, but is extended to all those who came under the description of the *Burgeses Regis* through an extensive county.



mite Dunet justiciario, Ricardo de Moravill constabulario, Waltero Oliver, Philippo de Vallon. Hugone Giff, Rogero de Vallon. Roberto de Berk. Tenor vero tertiae cartae dicti Wilhelmi Regis sequitur in hunc modum: "Wilhelmus, Dei gratia, Rex Scotorum, &c. salutem: Sciatis, nos dedisse, concessisse, et hac presenti carta nostra confirmasse, Gaufrido Blundo burgen. nostro de Innernefs, et heredibus suis, et omnibus burgen. nostris de Innernefs, et eorum heredibus, perpetuam libertatem, quod nunquam inter eos bellum habebunt, nec aliquis alius burgen. aut aliquis alius homo, de toto regno nostro, super eisd. burgen. nostros de Moravia, nec super heredes eorum, bellum habebunt, nisi tantum juramentum. Praeterea, concessi eisd. burgen. meis de Moravia, et heredibus eorum, ut dimidium juramentum et dimidiam forisfacturam faciant, quod ceteri burgen. mei faciunt in toto regno meo, et quieti erunt de tollaneto per totum regnum meum in perpetuum. Teste Davide Comite fratre meo, Comite de Fife justiciario Scotiae, Gilberto Comite de Stratherne, Hugone Cancellario, Joanne de Allug, Philippo de Vallon. W<sup>mo</sup> Cummin, Petro de Pollock, W<sup>mo</sup> filio Fredin, Hugone filio suo, et Willielmo filio ejus, apud Elgin, die secundo Maii." Tenor vero quartae cartae ejusd. W<sup>mi</sup> Regis sequitur, et est talis: "Willielmus, Dei gratia, Rex Scotorum, Episcopis, abbatibus, comitibus, baronibus, justiciariis, vicecomitibus, praepositis, ministris, et omnibus probis hominibus totius terrae suae, clericis et laicis, salutem: Sciant praesentes et futuri, me constituiisse diem fori in burgo meo de Innernefs, scilicet diem Sabbati, in qualibet hebdomada, et meam et firmam pacem juste dedisse omnibus, qui ad forum meum de Innernefs venient; et prohibeo firmiter, ne quis hiis, qui ad forum meum venient, in veniendo vel redeundo, injuriam vel molestiam, vel gravamen aliquod, injuste inferre presumat, super meam plenariam forisfacturam. Concessi etiam burgenfibus meis, qui burgum meum de Innernefs inhabitabunt, omnes leges et rectas consuetudines, quas



quas alii burgen. mei, et aliis burgis meis in Scotia habitantes, habent, et ut nullus infra balliam de Innernefs faciat extra burgum meum pannum tinctum, vel tonsum, contra assisam regis Davidis avi mei, et meam; et, si quis pannus inventus fuerit tinctus vel tonsus factus, contra hanc meam defensionem, praecipio ut vicecomes meus de Innernefs, pannum illum capiat. et judeficiat, sicut consuetudo et assisa tempore regis Davidis avi mei, nisi forte alicui libertatem talem per cartam meam dederim. Prohibeo etiam firmiter, ne quis emat vel vendat, extra burgum meum, aliquod quod sit contra assisam Regis Davidis avi mei, et meam. Prohibeo etiam firmiter, ne quis taberna habeatur in aliqua villa campestri, extra burgum meum, nisi in villa ubi miles dominus villae sit manens, et tum habeatur ibi taberna, secundum assisam Regis David avi mei, et meam. Praecipio itaque firmiter, balivis meis de Innernefs, quatenus praedictis burgen. meis de Innernefs auxiliantes sint, et eos iuste manu teneant ad praedictas rectas consuetudines burgi habend. Et ne quis prohibeo, praedictos burgen. meos contra praedictas rationabiles leges et consuetudines injuste vexare praesumat, super meam plenariam forisfacturam. Teste Waltero Capellano meo, Willielmo Cummin justiciario, Willielmo de Bosch, et Hugone, clericis meis, Ada parsona de Kingorne, Herberto de Camera, Rogero de Mortua-mari, Ricardo filio Hugonis, apud Kintore decimo octavo die Augusti." Tenor vero cartae serenissimi praedecessoris nostri, Alexandri Scotorum Regis, sequitur in hac forma: "Alexander, Dei gratia, Rex Scotorum, omnibus probis hominibus totius terrae suae, salutem: Sciatis, quod concessimus burgen. nostris de Invernes, ut nullus eorum nametur in regno nostro pro aliquo, nisi pro suo proprio debito, forisfacto, aut plegiagio. Praeterea, mandamus et praecipimus, vicecomitibus nostris et balivis, ex aquilonali parte de Delmoneth constitutis, vel omnibus et eorum balivis, qui debita burgen. nostris debuerunt, quod rationabiliter probare potuerunt, ad eadem debita eis iuste et sine dilatione reddend.



juste distringant. Firmiter autem inhibimus, ne quis debita, quae eis debet, injuste detineat, aut etiam ipsos contra praedictam concessionem nostram, quam eis fecimus, de namis suis injuste vexare praesumat, super nostram plenariam forisfacturam. Teste David Elect. Dunkelden, David abbate de Newbottil, Alano Host. justiciario Scotiae, et Gilberto de Haya, apud Sconam, 3tio die Decembris, ann. regni Domini regis 2do." Tenor vero alterius cartae dicti Alexandri Regis sequitur in hunc modum: "Alexander, Dei gratia, Rex Scotorum, omnibus probis hominibus totius terrae suae, clericis et laicis, salutem: Sciant praesentes et futuri, nos dedisse, concessisse, et hac praesenti carta nostra confirmasse, burgen. nostris de Invernes, terram de Markynch, ad sustentationem burgi de Invernes, tenend. et habend. eisd. burgen. de nobis et heredibus nostris, in perpetuum, libere, quiete, ad firmam burgi nostri de Invernes sustinend. ita quod dictam terram de Markynch, colant si voluerint, et modis omnibus quibus poterint commodum suum de ea faciant; reddendo annuatim unam libram piperis ad festum Sancti Michaelis. Teste W<sup>o</sup> filio Alani Senescallo, Scotiae justiciario, Edwardo Comite de Angus, Edwardo Comite Catanen. Hugone de Vaill, Waltero Wyzet, Waltero de Petyn, Davide Mariscallo, apud Invernes vigesimo sexto die Julij, ann. reg. Domini regis vigesimo secundo." Tenor vero cartae dicti serenissimi praedecessoris nostri, David Scotorum Regis, sequitur, et est talis: "David, Dei gratia, Rex Scotorum, omnibus probis hominibus totius terrae suae, salutem: Sciatis, nos affedasse, et ad feodi firmam dimisisse, ac in feodo in perpetuam concessisse, fidelibus nostris burgensibus et communitati burgi nostri de Invernes, totum burgum nostrum de Invernes, cum terra de Drekeis, cum pertinen. infra vicecomitatum de Invernes, tenen. et habend. eisdem communitati et burgensibus et heredibus eorund. ac successoribus in perpetuum, in feodo et hereditate, per omnes rectas metas, et divisas suas, cum omni territorio ipsi burgo adjacenti, cum piscariis, molendinis, multuris, et eorum sequelis, cum  
tholonea



tholoneo et parva custuma dicti burgi ; necnon cum omnibus aliis et singulis libertatibus, commoditatibus, et assamentis, rectis consuetudinibus, ac justis pertinentiis quibuscunque, tam non nominatis quam nominatis, ad praedictum burgum et terras praedictas spectant. seu quovis modo juste spectare valen. in futurum, libere, quiete, plenarie, integre, bene, et in pace ; reddendo inde nobis et heredibus nostris annuatim, ad terminos Pentecostes et Sancti Martini in hieme, per equales portiones, octuaginta mercas Sterlingorum : In cuius rei testimonium, praesenti cartae nostrae sigillum nostrum praecipimus apponi ; testibus venerabilibus in Christo patribus, W<sup>mo</sup> Epo Sancti Andreae, et Patricio Epo Brechinen. cancellario nostro, Roberto Senescallo Scotiae, nepote nostro, Willielmo Comite de Douglas, Roberto de Erskin, Archibaldo de Douglas, et Willielmo de Dishingtoun, militibus, apud Perth, tertio die Martii, anno regni nostri quadragesimo.” Tenor vero cartae dicti serenissimi avi nostri, Jacobi primi Scotorum regis, sequitur in hunc modum : “ Jacobus, Dei gratia, Rex Scotorum, praeposito et ballivis burgi nostri de Invernes, salutem : Quia pro parte burgensium burgi nostri de Invernes, per viam communis querelae nostris auribus est deductum, quod nonnullae personae bondas et libertatem dicti burgi inhabitantes, mercaturas, aut alia bona venalia, extra dictum burgum emendo et vendendo, ipsius privilegium et libertatem usurpant et infringunt, in dicti nostri burgi non modicum prejudicium et gravamen ; vobis igitur et vestrum cuilibet stricte praecipimus et mandamus, quatenus in solempnioribus locis dicti burgi et libertatibus ejusd. autoritate nostra publice proclamari faciatis, quatenus omnes et singulas bondas dict. burgi et libertatem ejusd. inhabitantes qui aliquas habuerunt mercaturas, seu bona vendenda quaecunque, ad forum dicti burgi nostri pro ipsis vendendis conveniant, et realiter se praesentent, prout in aliis burgis nostris, et eorum libertatibus consuetum extitit, infra regnum nostrum, pariter et observatum. Quod si mandatis nostris minime obtemperaverint in praemissis, volumus.



lumus et ordinamus, quod omnes praemissi hujusmodi mercaturas et bona sic de cetero extra dictum burgum nostrum empta et vendita, per vos autoritate nostra plenarie eschaeantur, confiscantur, et ad usum nostram ac commodum specialiter conserventur; super quibus vobis et vestrum cuilibet, conjunctim et divisim, vices nostros et mandatum committimus per praesentes. Datum sub testimonio magni sigilli nostri apud Invernes, vicesimo octavo die Augusti, anno regni nostri vicesimo tertio." Quas quidem cartas, literas, et evidencias, ac donationes et concessiones, libertates, immunitates, et privilegia in eisd. content. supplicationibus dictorum praepositi, ballivorum, burgen. et communitatis annuen. ne gratia a nostris progenitoribus dicto burgo nostro facta deperiret, de nostro maturo consilio in omnibus suis punctis, et articulis, conditionibus, et modis ac circumstantiis suis quibuscunque, forma pariter et effectu in omnibus, et per omnia approbamus, ratificamus, et pro nobis, heredibus, et successoribus nostris, ut praemissum est, pro perpetuo confirmamus; salvis nobis heredibus, et successoribus nostris, juribus, et servitiis de dicto burgo ante praesentem confirmationem nobis debitis et consuetis. In cujus rei testimonium, praesenti cartae confirmationis magnum sigillum nostrum apponi precepimus; testibus reverendis in Christo patribus Jacobo Episcopo Sancti Andreae, avunculo nostro carissimo, David Epo Moravien. Henrico Episcopo Rossen. Willielmo Episcopo Cathanie, dilectis consanguineis nostris, Andrea domino Avandale cancellario nostro, Johanne Comite Rossie, et domino Insularum, David Comite Craufurdie, Colino Comite de Ergile, Gilberto Domino Kennedy, Johanne Domino Dernle, Johanne de Culquhone de eodem, milite, computorum nostrorum rotulatore, magistris Archibaldo de Quhitlaw, Archidiacono Moravien. Secretario nostro, et David Guthery de Kincaldron, thesaurario nostro, apud Invernes, decimo sexto die mensis Augusti, anno Domini millesimo quadringentesimo sexagesimo quarto, et regni nostri quinto.



## No. III. (Page 48.).

*Act of William and Mary respecting the borough of Anstruther Wester,  
dated July 2. 1690.*

OUR Sovereign Lord and Lady, the King and Queen's Majesties, and the three estates of parliament, considering that the burgh of Anstruther Wester having been greatly impoverished through the decay of trade therein, and heavie impositions thereupon, did, in August 1672, resigne in parliament their privileges as a burgh royal, and delivered up their charter of royaltie, in sure confidence that they should, in all time thereafter, have been exeemed and freed from payment of all publick burdens as a burgh royal, and which was accepted in parliament, upon condition that the rest of the royal burrowes should lay on the said burghs part of the taxt roll amongst themselves, and expunge the said burgh out of their burrows rolls; notwithstanding whereof, the royal burrows refusing to doe the same, the said burgh was still continued and called both in roll of parliament and burrows, and when cess and supplies were laid on by conventions and parliaments thereafter, the said burgh was always made liable, and imposed upon by them as the rest of the royal burrowes for their proportional parts of all the saids impositions, and quartered upon for payment thereof, and charged yearly for making aeque in Exchequer, as they had been formerly before the said resignation; and seeing the said burgh hath been still kept under all impositions and publick burdens whatsoever, with, and as the rest of the royal burrowes, since the said resignation, in the same manner as before, therefore, their Majesties, with consent  
of



of the saids three estates of parliament, doe hereby declare, that the said burgh was, nor is, noweyes divested of their royaltie by the foresaid resignation, seeing the samen did noe weyes attaine its true native end, but that the said burgh did legally and warrantably use, at least might have used, and may for the future still use, all its former privileges as a burgh royal, sicklike in all respects as before the said resignation, and as it had never been made, and notwithstanding thereof; and ordains their clerk of register to delyver back to the magistrates of the said burgh, and to the inhabitants thereof, in case there be noe magistrates thereintill for the tyme, their said charter of royalty, dispensing hereby with the foresaid resignatione, and all that hath followed thereupon, for now and ever; and their Majesties, with consent foresaid, hereby rescinds and reduces the act of parliament following upon the said resignatione in the said month of August 1672, in the haill heads and articles thereof.

No. IV. (Page 50.).

*Litera Actornatus ad Parliamentum* \*.

PATEAT universis per presentes, nos Patricium, miseratione divina, abbatem monasterii de Calcow, una cum consensu totius capituli nostri, ordinasse, fecisse, ac constituisse dilectos nobis in Christ. reverend. in Christ. patrem Dominum W. Dei gratia, abbatem monasterii de CC. Dominum W. de S. de T. militem, vel eorum aliquos, vel aliquem, nostros veros ac legitimos actornatos, seu procuratores speciales ad comparend. pro nobis et nostro monasterio in parlamento

\* From the Chartulary of Kelso, fol. 172.



liamento Domini nostri Regis, apud Sconam, die Lunae, xx<sup>o</sup> die mensis Maii proximo futuro, cum continuatione dierum, subsequen. Dantes et concedentes predictis procuratoribus, seu actornatis nostris, viz. uni, vel pluribus, conjunctim, vel divisim, nostram plenariam potestatem ibid. ad conferend. tractand. consulend. et determinand. super variis et arduis Domini nostri Regis et regni, negociis tractandis et determinandis scribend. ac concordand. una cum aliis regni prelati et proceribus, qui ibid. de mandato dicti Domini nostri propter hoc interfuit congregati; et omnia alia ac singula ibid. faciend. quae veri ac legitimi procuratores, seu actornati speciales de jure facere possunt aut debent; ratum et gratum habentes et habituri, quicquid antedicti procuratores nostri seu actornati, eorum unus vel plures conjunctim vel divisim, dicto parlamento durante, nomine nostro duxerint, vel duxerit faciend. in premissis. In cujus rei testimonium, presenti scripto sigillum commune capituli nostri apposuimus apud M. nostrum.

N. B. The date of this power of attorney is wanting; but there is reason to believe that it is as old as 1258. We learn from the chronicle of Melrose, pages 222. 223. and 225. that, upon the death of Robert abbot of Kelso, in 1258, he was succeeded by a monk of that house, of the name of Patrick, and that this Patrick continued abbot only till 1260, when he was succeeded by Henry of Lamberden. It also appears, that, in 1258, the 20th day of May fell upon a Monday; and hence we may, with a considerable degree of probability, ascribe the date of the instrument to that year.



No. V. (Page 51.).

## Act of the Parliament 1585.

*Anent Commissionaris of the Schyres to be send to the Parliament.*

ANENT the article presentit to our Soverane Lord, and thrie estaitis of this present parliament, makand mentioun how necessar it is that his hienes and thay be weill and trewlie informit of the neidis and causes pertening to his loving subjectis in all estaitis, specialie the commonis of this realme, and remembering of ane gude and loveable act maid be his hienes progenitor, King James the first, of worthie memorie, being the hundreth and twelf act maid in the tyme of his reigne, intitult, 'That small baronis and freehalderis 'misteris not to cum to parliament \*,' requirand that his Majestie and his saidis estaitis wald ratifie the same act, and ordane the same to haiff full effect, and to be put in executioun in tyme cuming; and of new statutis and ordanis, for the mair full explanatioun of the same act, and certane executioun thairof, that precepts sould be direct furth of the Chancellarie to ane baroun of ilk schyre, for the first, to conveine the freehaulderis within the same schyre for cheffing of the commissiouneris, as they ar contenit in the said act; quhilks commissiouneris being anys chosin and send to parliament, the preceptis of chancellarie for conveyeing of freehaulderis, to the effect

\* The act here referred to is that of 1427, cap. 101. and its title is, 'That small baronnes and freeholders needis not to come to parliamentes.'



effect forsaide, to be direct to the last commissioneris of ilk schyre, qua fall caus cheis twa wise men, being the Kingis freehauleris, resident indwellers of the schyre, of guid rent, and weill esteemit as commissioneris of the samyn, to have a power, and be autorizit as the act proportis, under the commissioneris seill in place of the sher-riff's, and that all freehaularis of the King, under the degree of prelattis, and lordis of parliament, be warnit, be opin proclamation, to be present at the chesing of the saids commissioneris, and nane to have voit in thair election bot sic as hes forty shilling land in frie tenandrie, haldin of the King, and hes thair actuall dwelling and residence within the same schyre, lykeas at mair lenth is contenit in the saids articles; the estaitis presentlie convenit in this present parliament remittis the said mater to the will and gude consideratioun of our Soverane Lord, to do and ordane thairin as his hienes fall think maist requisite and expedient, betwix this and his hienes nixt parliament, at qlk tyme his hienes, with avise of his estaitis, will, God willing, tak order for the finall settling and establisshing of that gude forme and order qlk fall be thocht meit and convenient, to stand in perpetuitie in this behalf, without prejudice of the right or interesse of any of the estaitis, or otherwayis quhatsumevir. And Sir John Maitland of Thirlistane, knicht, secretaire to our Soverane Lord, and William Douglas of Glenbervie, for thameselfis, and in name and behalf of the rest of the baronis, tuke instrumentis of the forsaide act, and that the said matter was referrit be the haill estaitis to the Kingis Majesties self, and that his hienes acceptit the same upon him.



No. VI. (Page 53.).

Act of the Parliament 1681.

*Act in favour of the Commissioners of the Shire of Dumfries anent their fees. September 17. 1681.*

ANENT a petition presented to the King's Majesty, and estates of parliament, by Sir Robert Dalzell of Glenae, and Robert Grierson of Lag, commissioners for the shire of Dumfries, bearing, that, in the year 1668, when the said shire of Dumfries were about the electing of commissioners to the then ensuing parliament, the freeholders of the shire did, for preventing the election of some persons at that time, enter into ane mutual band, by which those who were to be chosen as commissioners were obliged to exact no commissioners fees; and albeit the said band was never delivered, nor designed to be made effectual, but only to serve ane turn for the time, and that most of the freeholders did thereafter meet, and discharge the same, and have paid their commissioners fees constantly since, yet the said band having fallen in the hands of some malicious persons, who have put the same in the register, the said band is frequently made use of for procuring of suspensions to such of the freeholders as are contentious, and unwilling to pay the commissioners fees of the said shire, conform to act of parliament, and therefore humbly craving that the said band might be declared void and null, and that the freeholders might be declared liable to pay to the petitioners their fees, conform to act of parliament, and to any others to be  
elected



electd commissioners for the said shire in time coming, notwithstanding thereof; the King's Majesty, and estates of parliament, having heard and considered the forsaide petition, and report of the articles thereanent, doe find that the band above mentioned was unwarrantable, and therefore have rescinded, and rescinds, the same, as if the same had never been; and doe declare that the freeholders of the said shire of Dumfries are liable to pay the expences of the saids petitioners, and of others who shall in time coming be electd commissioners for the said shire, conform to act of parliament, notwithstanding of the forsaide band.

No. VII. (Page 58.).

*Part of a Letter from Thomas Randolph to Sir William Cecil, dated August 10. 1560.*

THE barons, who, in time past, have been of the parliament, had yesterday a convention among themselves in the church, in very honest and quiet sort. They thought it good to require to be restored unto their ancient liberty, to have voice in parliament. They presented that day a bill unto the Lords unto that effect, a copy whereof shall be sent as soon as it can be had. It was answered unto gently, and taken in good part. It was referred unto the Lords of the Articles, when they are chosen, to resolve thereupon.

This present morning, viz. the 9th, I understood the Lords intended to be at parliament, which caused me somewhat to stay my letter, to see what I could hear or learn worth the reporting unto  
your



your honour. The Lords, at 10 of the clock, assembled themselves at the palace, where the Duke lieth: From thence they departed towards the tolbooth, as they were in dignity, each one being set in his seat in such order as your honour shall receive them in this scroll. The crown, the mace, the sword, were laid in the Queen's seat. Silence being commanded, the L. of Lidington began his oration. He excused his insufficiency to occupy that place. He made a brief discourse of things past, and of what necessity men were forced unto for the defence of their country; what remedy and support it pleased God to send them in the time of their necessity; how much they were bound heartily to acknowledge it, and to requite it. He took away the persuasion that was in many mens minds that lay back, that misdeemed other things to be meant than was attempted. He advised all estates to lay all particulars apart, and to bend themselves wholly to the true service of God and of their country. He willed them to remember in what state it had been in of long time for lack of government, and exercise of justice. In the end, he exhorted them to mutual amity. He prayed God long to maintain this peace and amity with all Princes, especially betwixt the realms of England and Scotland, in the fear of God, and so ended. The clerk of the register immediately stood up, and asked them to what matter they would proceed. It was thought necessary that the articles of the peace should be confirmed with the common consent, for that it was thought necessary to send them away with speed into France, and to receive the ratification of them as soon as might be. The articles being read, were immediately agreed unto; a day was appointed to have certain of the nobles subscribe unto them, and to put to their seals, to be sent away by a herald, who shall also bring the ratification again with him. The barons, of whom I have above written, required an answer to their request; some what was said on the contrary. The barons alledged for them custom and authority. It was in the end resolved, that there should be chosen six to join.



join with the Lords of the Articles, and that, if they, after good advisement, should find it right, and necessary for the commonwealth, it should be ratified at this parliament for a perpetual law. The Lords proceeded immediately hereupon to the chusing of the Lords of the Articles. The order is, that the Lords Spiritual chuse the temporal, and the temporal the spiritual, and the burgeses their own. There were chosen as on this paper I have written. This being done, the Lords departed, and accompanied the Duke, all as far as the bow, (which is the gate going out of the High-street), and many down into the palace, where he lieth; the town all in armour, the trumpets sounding, and other musick such as they have. Thus much I report unto your highness of that that I did both hear and see. Other solemnities have not been used, saving, in times long past, the Lords have had parliament robes, which are now with them wholly out of use.

No. VIII. (Page 58.).

*Petition of the Lesser Barons to the Parliament held in August 1560, transmitted by Thomas Randolph to Sir William Cecil, in his letter of the 15th of that month.*

MY LORDS, unto your Lordships humbly means and shows, we the barons and freeholders of this realm, your brethren in Christ, that, whereas the causes of true religion, and common well of this realm, are, in this present parliament, to be treated, ordered, and established, to the glory of God, and maintainance of the commonwealth, and we being the greatest number, in portion, where the said causes concern, and has been, and yet are, ready to bear the  
greatest



greatest part of the charges thereuntill, as well in peace as in war, both with our bodies and with our goods, and seeing there is no place where we may do better service now than in general councils and parliaments, in giving our best advice and reason, vote and counsel, for the furtherance thereof, for the maintainance of virtue, and punishment of vice, as use and custom had been of old, by ancient acts of parliament, observed in this realm, whereby we understand, that we ought to be heard to reason and vote in all cases concerning the commonwealth, as well in councils as in parliaments, otherwise, we think, that whatfomever ordinances and statutes be made concerning us, and our estate, we not being required and suffered to reason and vote at the making thereof, that the same should not oblige us to stand thereto: Therefore, it will please your Lordships to take consideration thereof, and of the charge born, and to be born, by us, since we are willing to serve truly to the common well of this realm, after our estate, that ye will, in this present parliament, and all councils where the common well of the realm is to be treated, take our advice, counsel, and vote, so that, without the same, your Lordships would suffer nothing to be passed and concluded in parliament, or councils afore said, and that all acts of parliament made, in times past, concerning us, for our place and estate, and in our favour, be at this present parliament confirmed, approved, and ratified, and act of parliament made thereupon: And your Lordships answer humbly beseeches.

Of the success of this petition, the following account is given by Randolph, in a letter to Cecil, dated August 19. 1560. "The matters concluded and past, by common consent, on Saturday last, in such solemn sort as the first day that they assembled, are these: First, That the barons, according to an old act of parliament made in the time of James I. in the year of God 1427, shall have free voice in parliament. This act passed without any contradiction."

No.



No. IX. (Page 58.).

*Roll of the Parliament 1479.*

Episcopi

Archiepiscopus Sti Andraee

Episcopus Glasguen

Dunkelden

Aberdonen

Moravien

Abbates

Stae Crucis

Kelfo

Melros

Newbottil

Passaa

Jedworth

Sanct-Colms-Inch

Dominus Seytoun

Haleburton

Lindesay

Graham

Erskine

Somervell

Maxwell

Kilmawers

Crichton

Oliphant

Borthwick

Gray

Hume

Lile

Carlile

Comites et Barones

Huntlie

Athole

Buchan

Errol

Marshall

Morton

Dominus de Stobhall

Dominus de Ellieliston

Dominus de Dalhawfy

Dominus Kennedy

Praeceptor de Torphichen

Sir John Campbel of Low-  
den

Sir John of Maxwell

H h h

No.



No. X. (Page 58.).

*Roll of the Parliament 1524.*

## Pro Prelatis

## Pro Baronibus

Archiepiscopus Sti Andreae

Comes de Arran

Episcopus Dunkelden

Ergyle

Aberdonen

Murray

Candidae casae

Eglintoune

Postulat. Glasguen

Cassilis

Dumblanen

Montrose

Rossen

Roths

Brechinen

Abbates Stae Crucis

Dominus Maxwell

Paslay

Hume

Scone

Glammis

Kelso

Semple

Newbottil

Rofs

Lundoris

Setoun

Culrofs

Sommervell

Jedburgh

Auandale

Sti Columbi

Commissarii



## Commiffarii Burgorum

Edinburgh

Linlithgow

Striveling

Aberdeen

Perth

Haddingtoun

Irvine

Are

## No. XI. (Page 58.)

*The Names of the LL. and Burgeffes of the Parliament held in Scotland in August 1560\*.*

JAMES Duke off Chastellerault; James Erle off Arran; Archibald Erle off Ergyle; Jhon Erle off Athole; William Erle Marschal; David Erle Crawford; James Erle Mortoun; Alexander Erle off Glencarne; Andro Erle off Rothes; Hew Erle off Eglington; Gilbert Erle off Caffilis; Jhon Erle off Sutherland; George Erle off Caithness; Jhon Erle off Menteith; Jhon Archibisshop off Sanct Andr; Commendatare off Paslay; Robert Bisshop off Dunkeld; William Bisshop off Dumblane; James Bisshop off Ergyle; Alexander Archibisshop off Athenis, Elect off Galloway, and Commendatare off Inchaffray; John Elect off the Ilis, Commendatare off Ycolmkyl and Archattane.

H h h 2

George.

\* This parliament is not taken notice of in the public records; but the roll here given is taken from the Cotton Library; and the title is of the hand-writing of Secretary Cecil; See *Keith's history*, p. 146.



George Lord Gordoun; Jhon Lord Erskyn; Patrik Lord Ruthven; Alexander Lord Home; Jhon Lord Lyndesay off the Byris; William Lord Hay off Zestir; James Lord Somerville; William Lord Levingstoun; Andro Lord Stewart off Ouchiltre; Alexander Lord Saltoun; Robert Lord Boyd; Robert Lord Elphinstoun; Jhon Lord Innermeith; Patrick Lord Gray; James Lord Ogylvie; Jhon Lord Glamis; Jhon Lord Borthuick; Allane Lord Cathcart; James Lord Sanct Johnis.

James Commendatare off the Priorie off Sanct Andros and Pettinweme; Jhon Commendatare off Abirbrothok; Robert Commendatare off Halyrudhows; Jhon Commendatare off Coldinghame; Jhon Abbot off Lundoris; Donald Abbot off Couper; Andro Commendatare off Jedburgh and Restennot; Marke Commendatare off Newbottle; Adam Commendatare off Dundrannen; Jhon Abbot of New Abbey; Commendatare off Dryburgh and Inchmahome; Postulat off Cambuskyneth; James Commendatare off Sanct Colmis Inche; William Commendatare off Culrofs; Walter Abbot off Kinlofs; Gawine Commendatare off Kilwynnyng; Nichol Abbot off Ferne; Robert Commendatare off Deir; Jhon Priour off Portmoak; Robert Commendatare off Sanct Marie Isle; Robert Minister off Faulfurde.

The commissaries of burrois, viz. Edinburgh, Striveling, Perth, Abirdene, Dundee, Air, Irweine, Haddington, Lynlythgow, Glasgow, Peblis, Jedburgh, Selkirk, Coupar, Kingorne, Banff, Forfar, Invernes, Montrofs, Kircudbright, Wigtoun, Innerkething.

William Maister Merscheal; Jhon Maister off Maxwell off Terriglis, Knycht; Patrik Maister Lindey; Henry Maister Sinclair; William Maister off Glencarne; Hew Maister Somerville; James Dowglas



Dowglas off Drumlangrig, Knycht; Jhon Gordoun off Lochinver;  
 Alexander Stuart off Garleifs; Jhon Wallace off Cragye; William  
 Cwninghame off Cwninghameheid; Jhon Cwninghame off Caprin-  
 toun; Jhon Mwre off Rowallane; Patrick Howstoun off that Ilk;  
 George Buquhannane off that Ilk; Robert Menteith off Keris;  
 James Striveling off Keir; William Murray off Tullibardin;  
 Andro Murray off Balwarde; Jhon Wisheart off Pitarro; Wil-  
 liame Douglas off Lochlevin; Colin Campbel off Glenurquhard;  
 Williame Sinclare off Rosling; Jhon Creichtoun off Stratharde; A-  
 lexander Irwein off Drum; Allardes off that Ilk; Alexander  
 Frazer off Philorth; Williame Innes of that Ilk; Sutherland  
 off Duffus; Jhon Grant off Freuchy; Robert Monro off Fowlis;  
 George Ogylvie off Dunlugus; David Ogylvie off that Ilk; Jhon  
 Ogylvie off Innerquharite; Ogylvie off Cloway;  
 Ouchterlony off Kelly; Jhon Straithauchin off Thorntoun; Andro  
 Straton off Lawriestoun; Jhon Creichtoun off Ruthvennis; Tho-  
 mas Blair off Baltheock; Ogylvie off Inchemertyn; Thomas  
 Mawle off Panmure; Archibald Douglas off Glenbarve; Thomas  
 Fottringhame off Powry; Robert Grahame off Morphy; Robert  
 Stewart off Rossyth; Walter Lundy off that Ilk; Myreton  
 off Cammo; Arthure Forbes off Reres; Andro Wod off Largo;  
 Jhon Kynneir off that Ilk; Jhon Edmeston off that Ilk, zounger;  
 Gilbert Wauchope off Niddrie Merscheal; George Home off Spot;  
 Hamiltoun off Innerweik; David Home off Wedderburne;  
 Nisbet off that Ilk; Jhon Swintoun off that Ilk; William  
 Hamiltoun off Sanchar; George Crawford off Leffures; James  
 Cockburne off Scraling; Twedy off Drumelzear; Hew Wal-  
 lace off Cernel; Robert Lyndesay off Dunrod; Robert Maxwel off  
 Calderwood; Patrik Lermonth off Derfy; Jhon Carmichael off that  
 Ilk; Jhon Carmichael off Medowflat; George Haliburton off Pet-  
 cur; James Haring off Glasclune; Stewart off Gran-  
 tuly;



tuly; Jhon Stewart off Arntully; James Meinzeis off that Ilk;  
 Jhon Forrel off that Ilk; Maister Alexander Levingstoun off Do-  
 nipace; Jhon Cwninghame off Drumquhaffill; David Hamiltoun  
 off Fingaltoun; Henry Wardlaw off Torry;  
 Ramsay off Banff; James Heriot off Trabron; Walter Ker off Cef-  
 furde; John Ker off Phernihurst; Jhon Johnstoun off that Ilk;  
 Williame Dowglas off Quittinghame; Neil Montgomery off Lang-  
 schaw; Patrik Montgomery off Giffine;                    Montgomery off  
 Hefil-heid; Williame Cranstoun off that Ilk; Thomas Macdowal  
 off Makcarlton; Jhon Home off Coldingknowis; Patrik Hepburne  
 off Wauchtoun; James Forestar off Corstorphin; Jhon Sandilandis  
 off Calder; William Lauder off Haltoun; Jhon Cockburne off Or-  
 mestoun; George Brown off Colstoun; James Sandelandis off Cru-  
 vy;                    Baillie off Lamyngtoun; Sir James Hamiltoun  
 off Crawford; Jhon Knycht                    ;                    Arbuthnot off that  
 Ilk.

To these names are subjoined, by the person who sent the list to  
 Secretary Cecil, the following words: ' With mony utheris, bar-  
 ' ronis, freholdaris, and landit men, but (i. e. without) all ar-  
 ' mour.'



## No. XII. (Page 58.)

*Original draught of the Minute of the first Meeting of the Parliament 1579.*

PARLIAMENTUM excellentissimi Principis Jacobi sexti, Scottorum Regis, tentum et inchoatum, apud Edinburgh, vigesimo Octobris, anno Domini millesimo quingentesimo septuagesimo nono, per dominos commissarios subscriptos specialiter constitut. viz. Colinum Comitem Ergadie, Dominum Campbell et Lorne, Cancellarium, Andream Arolie Comitem, Constabularium, Hugonem Comitem Eglintoun, Dominum Montgomery, Johannem Comitem Montrosie, Dominum Ghrame, reverendissimos et venerabiles in Christo patres, Adamum Episcopum Orchaden, Alexandrum Episcopum Brechinen, Robertum Commendatarium Monasterii nostri de Dumfermeling, nostrum secretarium, Robertum Commendatarium de Deir, Alexandrum Commendatarium de Culrofs, dilectos nostros familiares, magistrum Davidem Borthwick de Lochhill, Robertum Creighton de Eliok, advocatos; Alexandrum Clerk de Balbirney prepositum burgi de Edinburgh, una cum Andrea Comite de Arrole constabulario, Roberto Keyth de Canterland, deputato marescalli, magistro Olivero Coult, deputato vicecomitis de Edinburgh, et Andrea Lyndesay adjudicatore nunc juratis et admissis, Sectis vocatis, curia affirmata.

The suittis being callit, and in the first the sherreff of Edinburgh, thir personis underwryttin comperit personalle, and utheris be their actornays and procuratoreis as followis :

Edin.



Edin. principall comperand personalle.

The laird of Innerleyth.

The laird of Rosling.

The laird of Mercheinstoun.

The laird of Kilbalberton.

Thir of the shereffdome of Edin. principal be actornays and procuratoreis.

The Lord Borthuick.

The laird of Edmestoun.

The laird of Nethrie Mershell.

The laird of Reidhall.

The Lord Ross.

The laird of Gordonishall.

George Haliburton, for his lands of Gogar.

The laird of Dammahoy, for his lands of Dammahoy and Libbertoun.

Andrew Howeson, futter for William Dowglas of Cramont regis.

The commisseris of Edin. be Alexander Clerk of Balbirnie, provost, and Henrie Neisbett.

The Shereff of Edinburgh, within the constabularie of Hadingtoun.

Thir personis comperand personalle.

George Hamiltoun, for his landis of Bancrief.

The laird of Blance.

The laird of Bafs.

Jonet Gibsone and James Adamefoun comperand for the landis of Goldinstanes.

Thir personis comperand be actornays and procuratoreis.

The laird of Colstoun.

The laird of Hirdmestoun.

The laird of Cranstoun.

Robert Lawson of Humbie.



The commisseris of Dunbar, William Bonkle.  
 The commisseris of Hadingtoun, Johne Cockburne.  
 The commisseris of Northberwick, Thomas Lawder.  
 The commisseris of Lauder per Ro. Home.

**The Shereffdome of Beruick.**

Thir personis comperand person-  
 alle.

Thir personis comperand be ac-  
 tornays and procuratoreis.  
 The laird of Cockburn of that  
 ilk.  
 The laird of Swintone.  
 The laird of Wylicleuch.

**The Shereff of Roxburgh.**

Thir personis comperand person-  
 alle.

Thir personis comperand be ac-  
 tornays and procuratoreis.  
 Johne and James Henesleis, com-  
 missieris for Jedburgh.

**The Shereff of Selkrig.**

Thir personis comperand person-  
 alle.

Thir personis comperand be ac-  
 tornays and procuratoreis.  
 John Murray, actornay for the  
 shereff of Selkrig, with the  
 fuitt-roll.  
 John Mitchellhill, commisser for  
 the burgh of Selkrig.



## The Shereff of Peiblis.

Thir personis comperand person-  
alle.

Adam Dickefone, for his landis  
of Roskuviefeld, and third  
pairt landis of Smythfield.

Johne Cockburne, for his landis  
of Glennis.

The laird of Romanois comperit  
for the shereff of Peiblis, and  
producit his fute-roll.

Thir personis comperand be ac-  
tornays and procuratoreis.

Andrew Chisholme, for his landis  
of Aikerfield.

The laird of Troquhair.

The laird of Horseburgh.

The laird of Pirne.

John Bowhay, for his landis of  
Bonytoun.

Gilbert Twedie commisser for Peiblis.

## The Shereff of Lanerk.

Thir comperand personalle.

The laird of Dunrod.

Thir comperand be actornays.

The laird of Cambusnethane.

The laird of Quhyttfurd.

The laird of Ley.

The laird of Jerviswode.

Sir James Hammiltoun.

Rolland Mure for Lanerk.

## The Shereff of Dumfreis.

Thir personis comperand person-  
alle.

Patrick M'Brair proveft, and commisser for Dumfreis, present.

Thir persons be actornays.

The Stewart of Annerdail.

The



The Stewart of Kirkulbrytt.

Thir personis comperand person-  
alle.

Harbert Gledstanes commisser for  
Kirkulbrytt.

Thir personis be actornays.

The Shereff of Wigtoun.

The Shereff of Air.

Thir personis comperand person-  
alle.

The laird of Auchinlek.

Thir personis be actornays.

Thomas Taitt of Knockindaile.

Johne Lockhart and Edward Wal-  
lace, commisseris for Air.

The Baillzie of Carrick.

Thir personis comperand person-  
alle.

Thir personis be actornays.

The laird of Lochnorreis comper-  
and be Richert Bynning, his ac-  
tornay.

The Baillzie of Conyghame.

Thir personis comperand person-  
alle.

Thir personis be actornays.

The laird of Dunlop.

Mure fen. for his landis of Mak-  
behill, be Air.



The Shereff of Ranfrew.

Thir personis comperand person- Thir personis be actornays.  
alle.

The Shereff of Bute.

Thir personis comperand person- Thir personis be actornays.  
alle.

The Shereff of Dumbartane.

Thir personis comperand person- Thir personis be actornays.  
alle.

The Shereff of Striveling.

Thir personis comperand person- Thir personis be actornays.  
alle.

The Shereff of Lynlythgow.

Thir personis comperand person- Thir personis be actornays.  
alle. Andro Kerr commisser for Lyn-  
David Dundas shereff-deputt, pre- lythgow.  
sentit his fuit-roll.

The Shereff of Perth.

Thir personis comperand person- Thir personis be actornays.  
alle. William Fleming, } pro Perth.  
Dioneis Conqueror, }



The Stewart of Straitherne.

Thir persones comperand perso- Thir persones be actornays.  
nalle.

The Stewart of Monteith.

Thir persones comperand perso- Thir persones be actornays.  
nalle.

The Shereff of Clackmannan.

Thir persones comperand perso- Thir be actornays.  
nalle.

The Shereff of Kinross.

Thir persones comperand perso- Thir persones be actornays.  
nalle.

The Shereff of Fyff.

Thir persones comperand perso- Thir persones be actornays.  
nalle.

James Lathrisk, deputt for the she-  
reff of Fyff, producit his suit  
role.

The Lord Sinclar.

James Hamiltoun for himself,  
and Jeane Dischingtoun, his  
spous, for his landis of Kil-  
brachmont and utheris.

Robert Fergusone commisser of  
Innerkeideing.

David Paterfoun commisser of  
Coupar.

Mr David Russell for Sanctan-  
deris.

William



William Bouffie for Craill.

Mr Thomas Beinstoun for Pit-  
tenweme.

John Boswel for Kingorne.

The Shereff of Forfer.

Thir persones comperand perso-  
nalle.

Thir persones be actornays.

Alex<sup>r</sup> Scrymgeor for Dundee.

Johnne Traill for Forfair.

David Persoun for Arbroith.

George Petrie for Montross.

The Shereff of Kincarne.

Thir persones comperand perso-  
nalle.

Thir persones be actornays.

The Erle Merchell comperand  
be Robert Keith of Canter-  
land, producit his fute role,  
and ane actornay for his hail  
landis.

The Shereff of Aberdeine.

Thir persones comperand perso-  
nalle.

Thir persones be actornays.

Gilbert Meinzie, provest, for  
Aberdeine.

Mr Thomas Malyffoun for Kin-  
tor.

The



The Shereff of Bamff.

Thir perfones comperand perfo- Thir perfones be actornays.  
nalle.

The Shereff of Elgin and Forefs.

Thir perfones comperand perfo- Thir perfones be actornays.  
nalle.

Johne Annand.

James Garne for Elgin, and  
protestitt rex<sup>ve</sup>.

W<sup>m</sup>. Wauch commiffer for For-  
refs.

The Shereff of Narne.

The Shereff of Crummertie.

Thir perfones comperand perfo- Thir perfones be actornays.  
nalle.

The Shereff of Innernefs.

Thir perfones comperand perfo- Thir perfones be actornays.  
nalle.

James Kinrofs commiffer for  
Innernefs.



## No. XIII. (Page 60.).

*Commission from the Freeholders of the Shire of Ayr to Sir John Cochrane and Sir John Cunyngham, 1681.*

W E barrones and freeholders within the shereffdom of Air, under subscriueing, considering that there is ane parliament to be holden att Edinburgh upon the tuentie-eight day of July instant, and wee, conforme to the call givne to us be William Earle of Dumfreis, shereff principal of the said shereffdome, who had order from his Majesty's privie counsell, having mett this day for electing commissioners within the said shereffdome, for attending the foresaid parliament, and being confident off the fidelitie and caire off our commissioners after specified, have unanimously elect, nominat, and choise, and be the tenor heirof elects, nominats, and choisses, Sir John Cochrane of Ucheltrie, and Sir John Cunyngham of Lamberttoun, knights, our commissioners for us, and in our names, giveand, granteand, and committeand to them, and aither of them, our full, free, plaine power, expres mandement, and charge, to repair to Edinburgh, or qr it fall hapne them to sitt the forsaid day, and their, and att all other dyatts that shall hapne the said parliament to meit, and ay and wheill the final end and cloase yrof, to meit with the remander members of parliament, and to treat, deale, voyce, and conclude, in all matters that shall hapne to be hanaled at the said parliament, and severall meittings yrof, ay and wheil the cloase of the sameine, for the glory of God, happienes, and prosperitie of the Kinge's Majesty, and weill of this natiōe, sicklyk, and als freillie in all respects as any other commissioner of the severall shyres with-

in



in this realme does, promising to hold firme and stable all and qt-  
somever thinges our faids commissiouners in the premisses lauffullie  
does. In testimonie qroff (thir presentis, writen be Fergus Houstoune  
wryter in Air) we have subscryvite thir presentis with our handes,  
at Air, the seventh day of Julii, jaivj & fourscoir ane yeires.

The above commissioun is subscribed by forty-three gentlemen,  
and by "Jo. Massoun, notar publick, clerk to the above writ-  
" en commissioun."

No. XIV. (Page 65.).

*Minute of Parliament, October 26. 1669.*

OUR Sovereign Lord, and estates of parliament, having con-  
sidered the report of the committee for the elections of commissioun-  
ers, concerning the two commissiouns granted in the shirriffdome of  
Stirling, do find, that neither of the elections have been formal, and  
conform to the acts of parliament, but that both appear to have  
been partially carried on; and therefore his Majesty, with advice  
and consent of his estates of parliament, doe appoint a new election  
to be made of commissiouners for that shire; and for that end, or-  
dains the sheriff-clerk to give information to all persons who, be  
act of parliament, are capable to vote in the election, or to be elect-  
ed commissiouners, to meet at Stirling upon the fourth day of No-  
vember next to come, and that there, at that tyme, they make choise  
of one of their own number to be their president, and then to pro-  
ceed to the election of commissiouners to the parliament, conforme

K k k

to



to the laws of the kingdom. And it is hereby declared, that non-residence shall not be an exception why any (otherwise capable) may not vote in the election, or be elected commissioner.

Forasmuch as diverse questions have arisen in the election of commissioners from the shires to the parliament, Whether such heretors, and others, who, by law, are capable to vote in the election of commissioners, or to be elected, being non-residenters within the shire, should be admitted as capable to vote in the election, or to be elected? For clearing whereof, his Majesty, with advice and consent of his estates of parliament, finds and declares, That non-residence shall not be an exception why any (otherways capable) may not vote in the election, or be elected commissioners.

No. XV. (Page 77.).

*Order to the Director of the Chancery to issue Writs or Precepts.*

THE King's Majesty, with the advice of his council, has ordained an parliament to be proclaimed to begin in the burgh of Edinburgh, the day of  
for ordering, treating, and concluding of such great matters as instantly occur concerning the King's grace, the weal of this realm, and the lieges thereof: Therefore, ordains the director of the chancery to direct precepts to all prelates, barons, commissars, and beal-zies of boroughs, and all others our Sovereign Lord's freeholders, within this realm, charging them to compear the said day and place,  
for



for their advice to be had in such things as at that time shall be proposed to them.

No. XVI. (Page 77.).

*Precept from the Chancery to a Sheriff or Bailie.*

JACOBUS, Dei gratia, Rex Scotorum, balivo suo de Cowall, et deputatis suis, salutem: Quia ex avifamento et deliberatione Dominorum nostri concilii, ordinavimus parliamentum nostrum tenendum apud Edinburgum, et inchoandum cum continuatione dierum, vobis praecipimus et mandamus, quatenus summoneat, seu publici summoneri faciat, omnes et singulos episcopos, abbates, priores, comites, barones, et caeteros liberetenentes, totius baliae vestrae, et de quolibet burgo, tres vel quatuor, de sufficientioribus burgenfibus, sufficientem commissionem habentibus, quod compareant coram nobis, dictis die et loco, in dicto nostro parlamento, una cum aliis regni nostri prelati, proceribus, et burgorum commissariis, qui tunc ibidem propter hoc intererunt congregati, ad tractandum, concordandum, fubeundum, et determinandum, ea, quae in dicto nostro parlamento, pro utilitate regni nostri, et reipublicae tractanda fuerint, concordanda, fubeunda, et determinanda: Et vos sitis ibidem dicto die, habentes vobiscum summonitionis vestrae testimonium, et hoc breve. Et hoc, sub pena quae competit in hac parte, nullatenus omittatis. Datum sub testimonio magni nostri sigilli apud Edinburgum, die anno regni nostri.

*Balivo de Cowall, }  
pro parlamento. }*

K k k 2

No.



No. XVII. (Page 77.).

*Special Precept to a Prelate.*

JACOBUS, Dei gratia, reverendissimo in Christo patri, Archiepiscopo Sancti Andreae, salutem: Quia ex avisamento, et deliberatione Dominorum nostri concilii, ordinavimus parliamentum nostrum tenendum, &c. (ut supra), vobis praecipimus, et mandamus, quatenus sitis ibidem, dicto die, coram nobis, in dicto nostro parlamento, una cum aliis regni nostri prelatis, proceribus, burgorum commissariis, qui tunc ibidem propter hoc intererunt congregati, ad tractand. concordand. subeund. et determinand. ea quae in dicto nostro parlamento, pro utilitate regni nostri, et reipublicae tractanda sunt, concordanda, subeunda, et determinanda. Et hoc sub pena quae competit in hac parte nullatenus omittatis. Datum, &c.

No. XVIII. (Page 77.).

*Special Precept to an Earl, or Lord of Parliament.*

JACOBUS, Dei gratia, dilecto consanguineo nostro Comite de salutem: Quia ex avisamento et deliberatione, &c. vobis praecipimus et mandamus, quatenus sitis ibidem, dicto die, &c.

No.



No. XIX. (Page 77.).

Proclamation for Calling a Parliament.

*At Edinburgh, the fifteenth day of July, one thousand six hundred and sixty-nine.*

CHARLES, by the grace of God, King of Scotland, England, France, and Ireland, defender of the faith, to all and sundry our good subjects, whom these presents do, or may concern, greeting: Forasmuchas, upon divers great and weighty considerations relating to the establishment of the quiet and happiness of this our ancient kingdom in all its interests, and for the good of our service, we do think it necessary to call a parliament to be held at Edinburgh, and to begin the nineteenth day of October next, at which time our commissioner, sufficiently authorised and instructed by us, shall be present; therefore, we, with advice of the Lords of our privy council, do hereby require and command all the Lords, Spiritual and Temporal, the Archbishops and Bishops, the Dukes, Marquisses, Earls, Viscounts, Lords, and our officers of state of this kingdom, to be present at our parliament the said day; as also, we do require and command all those who have right to choose commissioners for the several shires, to meet within the respective shires at the Michaelmas head court next ensuing, and make their elections according to law; and likewise, we require and command our royal boroughs to meet in due time for choosing of their commissioners, and that the Lords Spiritual and Temporal, and our officers of state aforementioned,



tioned, commissioners of shires and boroughs, and all other persons concerned, and having interest, be present at Edinburgh the foresaid nineteenth day of October, to keep this meeting of our parliament, under the pains contained in our acts of parliament made therea-  
 nent. And that all our good subjects may have notice of this our royal will and pleasure, we do hereby command our Lyon King at Arms, and his brethren heralds, macers, pursuivants, and messengers at arms, to make timeous proclamation hereof at the market cross of Edinburgh, and at the market crosses of the head boroughs of the several shires of this our kingdom, that none pretend ignorance.

(Signed) THO. HAY, *Cls. Sti Consilii.*

No. XX. (Page 78.).

*Warrants for New Elections during the Sitting of Parliament.*

May 11. 1703.

HER Majesties High Commissioner, and the estates of parliament, considering that Sir James Murray of Philiphaugh, one of the commissioners elected for the shire of Selkirk to this present parliament, is now promoted, by the Queen's Majesty, to be Lord Clerk Register, and one of her officers of state, therefore, they hereby ordain, and give warrant to the freeholders of the said shire, to meet, and elect another of their number to be commissioner, to the effect foresaid, at Selkirk, the 18th day of May instant, in the usual manner.

May



May 14. 1703.

HER Majesty's High Commiffioner, and the estates of parliament, confidering that the commiffion formerly granted by the barons and freeholders of the fhire of Fyfe, to Robert Douglas of Strathendrie, for representing them in this parliament, is now by parliament declared null, have therefore granted, and do hereby grant warrant and order to the fheriff-principal of the faid fhire, and his deputies, to call and convene the barons and freeholders of the faid fhire together, at the ufual place of their meeting, on the 25th of May instant, to the effect they may of new make choife of one to represent them, with their other three commiffioners, in this prefent parliament. To which they are hereby impowered; and ordains intimation, in the ufual manner, to be made hereof.

No. XXI. (Page 84.).

*Keith's Account of an Aét in 1542-3, allowing the Bible to be read in the vulgar tongue.*

THE new doctrines concerning religion had fo far prevailed in Scotland, notwithstanding the feveritys used againft the profeffors thereof in the late King's reign, by the influence of the fettled clergy, that, in the very first parliament holden after his death, by James Earl of Arran, tutor of the Queen, and governour of her kingdom, there was a propofal offered by the Lord Maxwell, on the 15th day of March 1542-3, being the fourth of the parliament, for a liberty of reading the Bible in the vulgar tongue: Which propofal was received and approved by the Governour and the Lords of the Articles: And becaufe this was the first public ftep towards



a reformation of religion, perhaps the reader will not be displeased to see the act inserted in this history, which is as followeth:

“Anent the writting givin in be Robert Lord Maxwell, in presens of my Lord Governour and Lordis of Articklis, to be avisit by them, gif the samin be reasonable or not, of the quhilk the tenor followis: It is statute and ordanit, that it fall be lefull to all our Soverane Ladyis lieges to haif the haly writ, to wit, the New Testament and Auld, in the vulgar tounge, in Inglis or Scottis, of ane gude and true translatioun, and that thai sal incur na crimes for the haifing and reding of the samin, providing alwayis that nae man dispute or hald oppinzionis, under the painis contenit in the acts of parliament. The Lordis of Articklis beand avisit with the said writting, finds the samin reasonable; and therefore thinkis that the samin may be usit amangis all the lieges of this realm in oure vulgar tounge, of ane gude, true, and just translatioun, because there was na law shewin nor producit in the contrair, and that nane of our Soveraine Ladyis lieges incur ony crimes for haifing or reding of the samin in form, as said is, nor fall be accusit therefore in time coming, and that na personis dispute, argow, or hald oppinzionis of the samin, under the saidis painis contenit in the foresaidis actis of parliament.”

It seems this draught of an act for having and reading the Holy Scriptures in the vulgar language had not been so privately concerted, but that the clergy had got notice of the design; and, therefore, immediately after reading of it, the Archbishop of *Glasgow*, then chancellor of the kingdom, offered to the parliament these following reasons why the act should not be passed into a law at that time, viz.

The



" The quhilk day, ane maist Reverend Fader in God, Gawine Archbishop of Glasgowe, chanceler, for himself, and in name and behalfe of all the prelates of this realm, beand present in parliament, schew, That there was an act instantly red in face of parliament, that the haly writ may be usit in our vulgar tounge, and that na crime suld follow thereupon throw the using thereof, and alegit in the said act that the three estates concludit the samen, whilk he, for himselfe and the remanent of the prelates, being present as ane of the three estates of the said parliament, dissassentit thereto simpliter, bot apponit thaim thereto unto the tyme that ane provincial counsell might be had of all the clergy of this realm, to avise and conclud thereupon gif the samen be necessar to be had in vulgar tounge, to be usit among the Quein's lieges or not, and thereafter to shaw the utter determination that shal be done in that behalfe; and thereupon askit instrumentis."

But, notwithstanding this protestation, the Lord Maxwell's bill was certainly enacted, seeing that, within two days after the parliament had risen, the Governour, who found himself best supported by the adversaries of the established religion, thought fit to cause issue out a proclamation, for notification to all the lieges of the act concerning the Holy Scriptures. Here follows the orders for the proclamation;

" GUBERNATOR,

Clerk of register, it is our will, and we charge yow, that ye gar proclaim this day, at the marcat crois of Edinburgh, the actis maid in our Soverane Ladyis parliament, that suld be proclamit and givin furth to hir lieges; and in speciale, the act made for having the New Testament in vulgar tounge, with certain additionis, and thereafter gif furth the copyis thereof, attentick as efferis to all thaim that will desyre the samyn, and insert this our command and

L l l

charge



charge in the bukis of parliament, for zoure warrant. Subscrivit with our hand at Edinburgh, the nineteenth day of Marche, the zeir of God fifteen hundred and ferty-two zeris.

JAMES G.

No. XXI. (Page 96.).

### Act of the Parliament 1663, cap. 1.

*Act anent the way and manner of the Election of the Lords of the Articles.*

THE which day, the Earl of Rothes, his Majesty's Commissioner, represented to the estates of parliament, that it was his Majesties express pleasure, that, in the constitution of parliaments, and choosing of Lords of the Articles at this session, and in all time coming, the same form and order should be kept which had been used before these late troubles, especially in the parliament holden in the year 1633. And the manner of election of the Lords of Articles at that time being now seen and considered by the estates of parliament, they did, with all humble duty, acquiesce in his Majesties gracious pleasure thus signified unto them: And, in prosecution thereof, the clergy retired to the exchequer chamber, and the nobility to the inner house of the session, (the barons and burgeses keeping their places in the parliament-house). The clergy made choice of eight noblemen to be on the articles, viz. the Duke of Hamilton, the Marquis of Montrose, the Earls of Errol, Marr, Eglington,



linton, Haddington, Callendar, and Annandale; and the nobility made choice of eight bishops, viz. the Archbishops of Sanct Andrews and Glasgow, the Bishops of Edinburgh, Galloway, Dunkeld, Breichen, Caithnes, and Isles; which being done, the clergy and nobility met together in the inner exchequer-house, and, having shown their elections to others, the persons elected, at least so many of them as were present, stayed together in that room, whilst all others removed; and they joyntly made choice of eight barons, and eight commissioners of boroughs, viz. Sir John Gilmour of Craigmillar, president of the session, Sir James Lockhart of Lee, Sir James Foulis of Collington, Sir Archibald Stirling of Carden, Sir Peter Wedderburn of Gosford, Sir Thomas Hamiltoun of Preston,

Murray of Polmais, and William Scott of Ardross, Sir Robert Murray, provost of Edinburgh, Master John Paterson of Perth, Alexander Wedderburn of Dundee, Gilbert Gray of Aberdeen, Duncan Nairn of Stirling, Andrew Carstairs of Sanct Andrews, Andrew Glen of Linlithgow, and William Cunnyingham of Air, burgeses; and then represented the whole elections to his Majesties Commissioner, who being satisfied therewith, did then, with the clergy and nobility, return to the parliament-house, where the list of eight bishops, eight noblemen, eight barons, and eight burgeses, being read, it was approven; and his Majesties Commissioner did add to the list the officers of state, and appointed the Lord Chancellour to be president in the meetings of the Lords of the Articles, who are to proceed in discharge of their trust, in preparing of laws, acts, overtures, and ordering all things remitted to them by the parliament, and in doing every thing else which, by the law and practick of the kingdom, belonged, or were proper to be done by the Lords of Articles at any time bygone.



No. XXII. (Page 106.).

*State of the Representatives from England to the House of Commons.*

|                                                                                                                 |       |
|-----------------------------------------------------------------------------------------------------------------|-------|
| FORTY counties in England send each two members . . . . .                                                       | 80    |
| Twenty-five cities, of which Ely sends none, but London four,<br>and all the others two . . . . .               | 50    |
| One hundred and sixty-seven boroughs send each two . . . . .                                                    | 334   |
| Other five boroughs, viz. Abingdon, Banbury, Bewdly, High-<br>am-Ferrers, and Monmouth, send each one . . . . . | 5     |
| The Cinque Ports, and their dependencies, send . . . . .                                                        | 16    |
| Two universities send each two . . . . .                                                                        | 4     |
| Twelve counties in Wales send each one . . . . .                                                                | 12    |
| Twelve boroughs, one each . . . . .                                                                             | 12    |
|                                                                                                                 | <hr/> |
|                                                                                                                 | 513   |



No. XXIII. (Page 108.):

*List of all the Royal Boroughs in Scotland, as divided into their several Classes or Districts; in which the precedence of the Boroughs of each district is observed, according to the order in which they were called in the rolls of the Parliament of Scotland.*

## EDINBURGH

- |                  |                      |
|------------------|----------------------|
| District 1. Tain | District 5. Perth    |
| Dingwall         | Dundee               |
| Dornoch          | St Andrews           |
| Wick             | Coupar               |
| Kirkwall         | Forfar               |
| 2. Inverness     | 6. Anstruther Easter |
| Nairn            | Pittenweem           |
| Forres           | Crail                |
| Fortrose         | Anstruther Wester    |
| 3. Elgin         | Kilrenny             |
| Banff            | 7. Dyfart            |
| Cullen           | Kirkcaldie           |
| Kintore          | Bruntisland          |
| Inverury         | Kinghorn             |
| 4. Aberdeen      | 8. Stirling          |
| Montrose         | Inverkeithing        |
| Brechin          | Dunfermline          |
| Aberbrothock     | Culrofs              |
| Inverbervie      | Queensferry          |

District



## District 9. Glasgow

Dumbarton

Renfrew

Rutherglen

## 10. Haddington

Jedburgh

Dunbar

North Berwick

Lauder

## 11. Linlithgow

Selkirk

Lanerk

Peebles

## District 12. Dumfries

Kirkcudbright

Annan

Lochmaben

Sanquhar

## 13. Wigton

Whithorn

New Galloway

Stranrawer

## 14. Ayr

Irvine

Rothsay

Inverary

Campbelton.

No. XXIV. (Page 122.).

*Proclamation for Electing and Summoning the Sixteen Peers of Scotland.*

G. R.

WHEREAS we have, in our council, thought fit to declare our pleasure for summoning and holding a parliament of Great Britain on the day of next ensuing the date hereof; In order, therefore, to the electing and summoning the Sixteen Peers of Scotland, who are to sit in the House of Peers in the said parliament, we do, by the advice of our privy



privy council, issue forth this our royal proclamation, strictly charging and commanding all the Peers of Scotland to assemble and meet at Holyroodhouse, in Edinburgh, on the day of next ensuing, between the hours of twelve and two in the afternoon, to nominate and choose the Sixteen Peers to sit and vote in the House of Peers in the said ensuing parliament, by open election, and plurality of voices of the peers that shall be there present, and of the proxies of such as shall be absent, (such proxies being peers), and producing a mandate in writing, duly signed before witnesses, and both the constituent and proxy being qualified according to law. And the Lord Clerk Register, or such two of the principal clerks of the session as shall be appointed by him to officiate in his name, are hereby respectively required to attend such meeting, and to administer the oaths required by law to be taken there by the said peers, and to take their votes; and, immediately after such election made, and duly examined, to certify the names of the Sixteen Peers so elected, and sign and attest the same in presence of the said peers, the electors, and return such certificate into our high court of Chancery of Great Britain. And we do, by this our proclamation, strictly command and require the Provost of Edinburgh, and all other the magistrates of the said city, to take special care to preserve the peace thereof during the time of the said election, and to prevent all manner of riots, tumults, disorder, and violence. And we strictly charge and command, that this our royal proclamation be duly published at the market-cross of Edinburgh, and in all the county towns of Scotland, twenty-five days at least before the time hereby appointed for the meeting of the said peers to proceed to such election.

Witness ourself at Westminster, the  
of in the

day  
year of our reign.

GOD SAVE THE KING!

*Proclamation,*



*Proclamation, on the death of one of the Sixteen Peers, for electing another.*

G. R.

[illegible]

No. XXV. (Page 122.).

*Form of a Proxy by a Peer.*

I by virtue of the power allowed by act of parliament to the peers of Scotland, to make proxies for nominating and appointing peers whom they shall judge fittest to sit and vote in the House of Peers of the parliament of Great Britain, and



and in obedience to his Majesty's proclamation, charging and commanding all the peers of Scotland to meet at Holyroodhouse, in Edinburgh, on \_\_\_\_\_ next, to nominate and choose the Sixteen Peers for Scotland, to sit and vote in the House of Peers of the ensuing parliament of Great Britain, do, by these presents, nominate and appoint \_\_\_\_\_ to be my

proxy or attorney, to the effect under written, giving, granting, and committing full power and commission to my said proxy, for me, and in my name, to appear at the ensuing meeting of the peers of Scotland, at Holyroodhouse aforesaid, for electing Sixteen Peers of Scotland to sit and vote in the House of Peers of the ensuing parliament of Great Britain, and to do every thing relating thereto, as fully, and in every respect, as I might or could do myself, were I personally present. In witness whereof, I have subscribed these presents, wrote on stamp paper by

at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ before  
these witnesses, &c.

No. XXVI. (Page 122.).

*Form of a Signed List by a Peer.*

I \_\_\_\_\_ by virtue of the powers allowed by act of parliament to the peers of Scotland, to send lists of peers whom they shall judge fittest to sit and vote in the House of Peers of the parliament of Great Britain, and in obedience to his Majesty's proclamation, charging and commanding all the peers of Scotland to meet at Holyroodhouse, in Edinburgh, on \_\_\_\_\_ next,

M m m

to



to nominate and choose the Sixteen Peers for Scotland, to sit and vote in the House of Peers, in the ensuing parliament of Great Britain, do, by this my list, name (here the list of sixteen peers are inserted), to sit and vote in the House of Peers of the ensuing parliament of Great Britain. In witness whereof, I have signed and sealed these presents, at the day of before these witnesses, &c.

Addressed thus:

To the Lord Clerk Register in that part of Great Britain called Scotland, or to his deputy, or deputies, officiating at the ensuing meeting of the peers of Scotland, at Holyroodhouse, for choosing Sixteen Peers for Scotland.

No. XXVII. (Page 122.).

*Certificate by a Sheriff of a Peer's having qualified himself to grant a Proxy, or send a Signed List.*

I Esq; advocate, sheriff-depute of the  
 sheriffdom of do certify and declare to the peers  
 of Scotland, to be assembled in his Majesty's palace of Holyrood-  
 house, at Edinburgh, upon the day of next,  
 betwixt the hours of twelve and two in the afternoon, to nominate  
 and choose the Sixteen Peers to sit and vote in the House of Peers,  
 in the ensuing parliament of Great Britain, that the Right Honour-  
 able



rable appeared  
 before me, in a fenced court held by me at  
 this day, where I did tender to him the oaths of allegiance and su-  
 premacy, and declaration against Popery, on paper, and oath of ab-  
 juration on parchment, which oaths and declaration the said  
 did repeat, swear, and subscribe; and I have herewith  
 returned the said oaths and declaration, so taken and subscribed, as  
 said is, as by the act of parliament, made in that behalf, is directed  
 and appointed. In witness whereof, I have signed and sealed these  
 presents, at the day  
 of and of his Majesty's reign the  
 year.

No. XXVIII. (Page 125.).

*Roll of the Peers that was daily called in the last Parliament of  
Scotland \*.*

| DUKES.         |              | EARLS.     |
|----------------|--------------|------------|
| Hamilton       | Athole       | Crawford   |
| Buccleugh      | Montrose     | Errol      |
| Lennox         | 10. Roxburgh | Marishal * |
| Gordon         | MARQUISSES.  | Sutherland |
| 5. Queensberry | Tweeddale    | 5. Marr *  |
| Argyle         | Lothian      | Monteith   |
| Douglas        | 3. Annandale | Roths      |
|                | M m m 2      | Mortoun    |

\* Those marked thus \* were attainted for their accession to the rebellion in 1715; and the others, marked †, on account of their being engaged in the rebellion in 1745.



|                 |                |               |
|-----------------|----------------|---------------|
| Mortoun         | 40. Carnwath * | Hopetoun      |
| Buchan          | Callender *    | Deloraine     |
| 10. Glencairn   | Leven          | 74. Ilay      |
| Eglintoun       | Dyfert         |               |
| Caffilis        | Panmure *      | VISCOUNTS.    |
| Caithness       | 45. Selkirk    | Falkland      |
| Murray          | Northesk       | Dunbar        |
| 15. Nithsdale * | Kincardine     | Stormont      |
| Winton *        | Balcarras      | Kenmure *     |
| Linlithgow *    | Forfar         | 5. Arbuthnot  |
| Hume            | 50. Aboyne     | Kingstoun *   |
| Perth *         | Newburgh       | Oxford        |
| 20. Wigtoun     | Kilmarnock *   | Irvine        |
| Strathmore      | Dundonald      | Kilsyth *     |
| Abercorn        | Dumbarton      | 10. Dumblain  |
| Kelly           | 55. Kintore    | Prestoun      |
| Hadingtoun      | Breadalbine    | Newhaven      |
| 25. Galloway    | Aberdeen       | Strathallan † |
| Lauderdale      | Dunmoir        | Teviot        |
| Seaforth *      | Melvile        | 15. Duplin    |
| Kinnoul         | 60. Orkney     | Garnock       |
| Loudoun         | Ruglen         | 17. Primrose  |
| 30. Dumfries    | March          |               |
| Stirling        | Marchmont      | LORDS.        |
| Elgin           | Seafeld        | Forbes        |
| Southesk *      | 65. Hyndford   | Saltoun       |
| Traquair        | Cromarty †     | Gray          |
| 35. Ancrum      | Stair          | Ochiltree     |
| Wemyfs          | Roseberry      | 5. Cathcart   |
| Dalhousie       | Glasgow        | Sinclair *    |
| Airly *         | 70. Portmore   | Mordingtoun   |
| Findlater       | Bute           | Semple        |
|                 |                | Elphinston    |







granted to us by the Right Honourable clerk register of Scotland, dated and registered in the books of council and session appointing us to officiate in his name at the said meeting of the peers, do hereby certify and attest, that, after the oaths and declaration required by law to be taken by the peers present were administered to them, and their votes, with those of the proxies, and signed lists of the absent peers, collected and examined, (here the names of the sixteen peers are inserted) were elected to sit and vote in the House of Peers in the ensuing parliament of Great Britain. In witness whereof, we have signed and sealed these presents with our hands, in presence of the peers electors, place and time above mentioned.

No. XXX. (Page 163.).

*Warrant by Queen Mary to the Sheriff of Aberdeen, in 1548, for extending or retouring all the lands of that county.*

M A R Y, by the grace of God, Queen of the Scots, to our sheriff of Aberdeen, and to his deputes, greeting: Forfameikleas our dearest cousin and tutor, James Earl of Arran, Lord Hamilton, &c. protector and governor of this realm, and Lords of our secreit council, understanding that our auld enemies of England intend the spring of this year to invade our realm with all their force and power, whilk may not goodlie be resisted without an general tax of men and money, as have been thought most necessar to be lifted off the haill estates of the same; whilk tax cannot be made till the time the said Lords know the value and extent of all the lands within

our



our realm. Our will is herefore, and we charge you straitly, and command, that, incontinent thir our letters seen, ye pass, with all diligence possible, and conveen ane condign assyse of the most famous men within the bounds of your office, and retour be them all manner of lands lying within the same, as well kirk lands as temporal lands, and the patrimony of our crown, and others being in our hands be reason of ward, or otherwise, and that the said assyse be chosen and sworn thereto in manner following, viz. the lands that gives presently of yearly maill and duty four pounds, to twenty shillings of old extent, general and universal, without any exception or regard to any retour passit a-before; and that ye bring and produce before us, our said tutor and governour, and Lords foresaid, your retour made in manner above written, to our borough of Edinburgh the 20th day of January instant, under the pain of rebellion, and putting you to our horn; and give ye failzie therein, the day being past, ye be denounced our rebel, and put to our horn. And on likeways, that ye command and charge the barons and landed men dwelland within the bounds of your said sheriffdome, to conveen with you at sick day and place as ye shall appoint unto them for making of the said retour, under the pain of rebellion; and, if they failzie therein, that ye denounce them that disobey, our rebels, and put them to our horn, and escheat and inbring all their moveable goods to us for their contempt, as ye will answer to us thereupon, to the execution of your office, delivering thir our letters be you duly execute and indorsit again to the bearer. Given under our signet at Strivling, the third day of January, and of our reign the seventh year, 1548.

*Per dominos secreti concilii.*

No.



No. XXXI. (Page 173.).

*Retour of the Mill and Mill Lands of Carridden, dated November 5.  
1547.*

HÆC inquisitio facta fuit in praetorio burgi de Linlithquow, coram honorabili viro Henrico Forrest, vicecomite ejusd. deputat. quinto die mensis Novembris, anno Domini JMVCXLVII, per hos probos patriae sequen. Robertum Wotherspoun de Westerag de Ogilface, Petrum Kornewall de Ballinhard, Andream Rofs de Wardlaw, Georgium Hamiltoun in Meidhop, Jacobum Kaa ballivum burgi de Linlithquow, Petrum Newlandis ejusdem ballivum, Petrum Hamiltoun filium et haeredem apparen. Alexandri Hamiltoun de Baithcat, Willielmum Craufurd in Kynneil, Johannem Wilsoun de Scottistoun, Alexandrum Hamiltoun in Baithcat, Willielmum Hamiltoun in Boggheid, David Kyncaid in lie Coittis, Johannem Gudlet in Strabrok, Robertum Jamesoun burgen. de Linlithquow, Patricium Auld ejusd. burgen. Petrum Polwert, et Robertum Spadye. Qui jurati dicunt quod quondam Willielmus Danyelstoun, burgen. burgi de Linlithquow, pater Jacobi Danyelstoun latoris praesentium, obiit ultimo vestitus et sasitus ut de feodo, ad pacem et fidem supremæ dominae nostrae Scotorum Reginae, de totis et integris illis novem terrarum acris jacen. circa praescriptum burgum de Linlithquow, viz. sex acris earund. jacen. contigue invicem in lie Magdalensyd, inter terras hospi beatae Mariae Magdalanae pertinen. et spectan. ex Orientali et Australi partibus, terras pertinen. altari Sancti Johanni Baptistae infra ecclesiam parochialem de Linlithquow situat. ex occidentali, et stratum publicum regium ex boreali partibus, quas Katerina Hamiltoun relicta



lieta quond. Thomae Pettygrew leonis armorum regis, occupabat ; et tribus acris terrarum earundem per quond. Joannem Spens occupatis, una acra jacen. in et prope seu juxta locum lie Madonzaird appellat. inter terras praefati quondam Willielmi ex occidentali, terras quondam Willielmi Hamiltoun in Pardowane ex orientali, unum torrentem vocat. Bellisburne ex australi, et terras de Bernishyle dicto Willielmo pertinen. ex boreali partibus, et aliis duabus acris terrarum jacen. contigue in Bernishyle, inter terras praefat. quond. Willielmo Hamiltoun in Pardowane pertinen. ex australi et orientali, terras quond. Johanni Danyelstoun rectori de Dysart spectan. ex boreali, et stratum regium publicum ducen. ad portum de Blackness, ex occidentali partibus ; cum suis pertinen. jacen. infra vicecomitatum de Linlithquow praedict. Ac etiam de advocatione, donatione, et jure patronatus Capellaniae seu altaragii altaris omnium sanctorum infra dictam ecclesiam parochialem de Linlithquow situat. ; necnon, de toto et integro molendino baroniae de Carriddin, nuncupat. lye Louchmyln, cum monte vocat. Mylnhyll, una cum aqueductu seu passagio dict. in vulgo lie Wattergang, lacus supremae dominae nostrae reginae de Linlithquow, ac etiam lie Sukken, divoriis, et astrictis multuris totalis et integrae praefatae baroniae de Carriddin, cum singulis suis pertinen. jacen. infra dictam baroniam de Carriddin, per annexationem, et infra vicecomitatum de Linlithquow antedict. Et quod dictus Jacobus est legitimus et propinquior haeres ejusd. quond. Willielmi patris sui, de dictis novem acris terrarum, cum advocatione, donatione, et jure patronatus capellaniae seu altaragii omnium sanctorum, infra praefatam ecclesiam parochialem de Linlithquow situat : Necnon de dicto molendino baroniae de Carriddin, nuncupat. lie Louchmyln, aqueductu, passagio, et lie Sukken, divoriis, et astrictis multuris totalis et integrae praefatae baroniae de Carriddin, cum singulis suis pertinen. Et quod est legitimae aetatis, et quod dictae novem acrae terrarum, cum advocatione, donatione, et



jure patronatus praefatae capellaniae seu altaragii, et suis pertinen. valent nunc per annum tresdecem solidis, et quatuor denariis monetae regni Scotiae, et tempore pacis valuerunt quatuor solidis ejusd. monetae. Et quod dict. molendinum, cum monte vocat. Mylnhill, aqueductu, caeteris praescriptis eid. molendino spectan. et suis pertinen. valent nunc per annum quatuor libris, et decem solidis monetae antedictae, et tempore pacis valuerunt quadraginta solidis ejusd. monetae. Et quod dictae novem acrae terrarum, cum advocatione, donatione, et jure patronatus praefatae capellaniae seu altaragii, et suis pertinen. tenentur in capite de suprema domina nostra Scotorum Regina, tanquam immediata domina superiore earund. reddendo ei inde annuatim tresdecim solidos et quatuor denarios, ad duos anni terminos, Penthecostes et Sancti Martini in hyeme, per equales portiones, nomine feodifirmae tantum. Et quod dict. molendinum, cum monte, aqueductu, lie Sukken, et astrictis multuris, et pertinen. tenentur in capite de Jacobo Cokburne de Langtoun, barone praefatae baroniae de Carriddin, tanquam immediato superiore eorund. per servitium feodifirmae, reddendo ei inde annuatim quatuor libros, et decem solidos monetae suprascript. ad duos usuales terminos suprascript. per equales portiones nomine feodifirmae tantum: Et quod dictae novem acrae terrarum cum advocatione, donatione, et jure patronatus praescript. capellaniae, nunc existunt in manibus supremae dominae nostrae Reginae, ratione non introitus, tanquam in manibus domini superioris earund. Et praefatum molendinum, cum monte, aqueductu, et astrictis multuris, existunt in manibus baronis suprascript. de Carriddin, ratione qua supra: Et quod dictae terrae, advocatio, donatio, et jus patronatus capellaniae antedictae, et praefatum molendinum, cum caeteris ejusd. spectan. antedictis fuerunt in manibus dominorum suorum antedictorum, respective, per spatium octo hebdomadarum ultimo elaps. aut circiter, ratione ead. ante confectiorem praesentium, per decessum dicti quond. Willielmi sui patris, ultimi domini haereditarii, possessoris



possessoris hujusmodi, in defectu praenominati Jacobi sui veri legitimi haeredis eorund. jus suum ad ead. huc usque minime persequentis. In cujus rei testimonium sigilla quorund. dictae inquisitioni interexisten. sub inclusione brevis, sigillo dicti vicecomitis antedict. praesentibus sunt appensa, anno mense die et loco praescriptis.

No. XXXII. (Page 199.)

### Act of the Parliament 1681.

*Act for Rectification of Valuations, and declaring Coal and Salt not to bear any part of the Supply.*

THE King's Majesty, and estates of parliament, taking to their consideration several petitions addressed to them, complaining of the inequality of the valuation of lands in diverse shires, several lands being exorbitantly valued, and others far below the true value, doe hereby authorize the Lords of his Majesties privy council, upon application to be made to them by the commissioners of supply in any of the shires, or major part of them, to grant warrand and commission to the commissioners of supplie or excise, or such others as they shall think fitt, to take tryel of such unequal valuations, and, after tryel, to revalue and rectify the valuation of the shire: And it is hereby declared, that coal and salt is not to bear any part of the supplie, providing always that the total of the shire be kept entire, without any diminution; and his Majesties privy council are hereby authorized to name and appoint commissioners of excise or supplie in the several shires as they shall find cause, upon application of a quorum of the commissioners.



No. XXXIII. (Page 210.).

*Minute of Parliament of the 18th of August 1681.*

THE which day was produced a letter by his Royal Highnes, direct by his Majesty to him, which was appointed to be recorded, whereof the tenor follows, (*supra*scribitur), *Charles R.* Most dear, and most entirely beloved brother, we greet you well: Being informed, that, by the 101st act of the 7th parliament of our royal predecessor, King James the first, it doth clearly appear that the shire of Kinross should be represented in parliament, and that, by the records of parliament, it is evident that the same was still represented by its commissioner accordingly, till almost all the shire (being a very small one) came to belong to the Earl of Mortoune and the Lord Burleigh, who being themselves noblemen, did in parliament represent their own lands; but that now, Sir William Bruce of Balcaiskie having acquired the Earl of Mortoun's interest, (which is the far greatest part of the shire), and having likewise a commission from the rest of the freeholders thereof, doth crave that he may represent that shire in parliament, according to former custom, founded upon the said act and records; and we being well satisfied with the dutiful deference shown to us by the said Sir William, in the prosecution of that his right, it is now our will and pleasure, and we do hereby authorise and require you, to cause him to be enrolled and called in this parliament, to the effect the said shire may enjoy its old privilege of being represented in parliament by its barons, as fully as it has been at any time heretofore, and as freely and fully



fully, in all respects, as any other shire doth, or may enjoy, the like privilege of being represented by a commissioner in parliament; and for preventing of all questions and debates hereafter in this affaire, it is our further will and pleasure that you cause these presents to be registrated in the records of that our parliament, and that authentick copies hereof may be given to the said Sir William Bruce, and such as hereafter shall happen to be elected commissioners for that shire, whenever he, or any of them, shall have occasion to call for the same; for doing of all which, this shall be to you, and all others that may be therein concerned, respectively, a sufficient warrant. And so we bid you heartily farewell. Given at our court, at Windsor Castle, the 13th day of August 1681, and of our reign the 33d year.

No. XXXIV. (Page 303.).

*Form of the Writ to the Sheriffs upon the Calling of a Parliament.*

GEORGIUS, Dei gratia, Magnae Britanniae, Franciae, et Hiberniae, Rex, fidei defensor, vicecomiti comitatus de salutem. Quia de avisamento et assensu concilii nostri, pro quibusdam arduis et urgentibus negotiis, nos, statum et defensionem regni nostri Magnae Britanniae, et ecclesiae, concernentibus, quoddam parliamentum nostrum, apud civitatem nostram Westminster die proximo futuri, teneri ordinavimus; et ibidem, cum praelatis, magnatibus, et proceribus, dicti regni nostri, colloquium habere, et tractatum; tibi praecipimus, firmiter injungendo, quod immediate, post debitam notitiam prius inde dandam, unum militem, gladio cinctum, magis idoneum et discretum comitatus praedicti.



dict. per liberetenentes ejusdem comitatus, qui electioni hujusmodi intererunt, secundum formam statuti in eadem casu editi et provisi, eligi facias. Tibi etiam praecipimus quod de quolibet regali burgo comitatus praedict. unum commissarium, ad elegendum unum burghensem, pro classe, sive districtu, de discretioribus, et magis sufficientibus, libere et indifferenter, juxta formam statuti inde editi et provisi, eligi facias. Et nomina eorundem militis et burghensis, qui tibi forent retornata per clericos ad inde appunctuatos, in quibusdam indenturis inter te et illos respective conficiendis, licet hujusmodi elegentes praesentes fuerint, vel absentes, inseri, eosque ad dictos diem et locum venire facias. Ita, quod idem miles et burghensis plenam et sufficientem potestatem habeant ad faciendum et consentiendum his, quae tunc ibidem, de communi concilio dicti regni nostri (favente Deo), contigerint ordinari super negotiis antedictis. Ita quod, per defectum potestatis hujusmodi, seu propter improvidam electionem militis et burghensis praedictorum, dicta negotia infecta non remaneant quovis modo. Nolumus autem quod tu, nec aliquis alius vicecomes dicti regni nostri, aliquallyter sit electus. Et electiones illas, quae tibi forent certificatae et retornatae, ut praefertur, nobis in cancellariam nostram ad dictos diem et locum, certifies juxta formam statuti, una cum hoc breve. Teste meipso apud Westminster die anno regni nostri

Written on the tagg thus:

Vicecomiti comitatus de  
mentum die

pro elegendo ad parlia-  
proximo tenendum \*.

No.

\* When a writ issues for supplying a vacancy during the course of a parliament, it mentions how the vacancy was occasioned, and is confined to the single election then to be made, whether of a knight of a shire, or of a burghers.







commanded, and firmly enjoined, immediately after, and upon receipt of the said writ, to give notice to the whole freeholders within the shire of \_\_\_\_\_ to the effect they may meet and elect one knight, or commissioner, for the said shire of \_\_\_\_\_ of the most fit and discreet of the shire of \_\_\_\_\_ aforeaid, according to the form of the statute in that case made and provided. These are, therefore, intimating, and making known to the haill freeholders and electors of the shire of \_\_\_\_\_ in pursuance of the said acts of parliament, and writ issued forth to us, that they meet and convene at \_\_\_\_\_ upon \_\_\_\_\_ being the \_\_\_\_\_ day of \_\_\_\_\_ betwixt the hours of twelve and two of the clock in the afternoon, in \_\_\_\_\_ in order to elect their representative of the said shire to sit and vote in the House of Commons of the parliament of Great Britain, which is to meet on the said \_\_\_\_\_ day of \_\_\_\_\_ next; and ordains intimation hereof to be made at the market-cross of \_\_\_\_\_ on a market-day following, and at the parish churches within the shire the next Lord's day, and to be read by the precentors immediately after divine service in the forenoon, and thereafter affixed on the most patent door of the said churches. Given and subscribed at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ and of his Majesty's reign the \_\_\_\_\_ year.



No. XXXVI. (Page 305.)

*Form of the Execution of the above Intimation.*

UPON the                      day of                      one  
thousand seven hundred and                      being a market day, and  
market time, betwixt the hours of eleven and twelve forenoon, I  
A. B. sheriff-officer, past, at command of the sheriff-depute of the  
sheriffdom of                      to the market-cross of the head  
borough of the sheriffdom thereof, and thereat, after my crying of  
three several Oyes's, and open proclamation, did publicly read the  
principal intimation and summons, intimating and summoning the  
respective freeholders within the said sheriffdom to convene and  
meet upon that day, at the place, and to the effect therein, and with-  
in mentioned; and after due proclamation, and public reading there-  
of, I affixed, and left at, and upon the said market-cross, a printed  
copy, whereof the within is a duplicate. This I did before these  
witnesses, C. D. and E. F. both sheriff-officers, and hereto subscri-  
bing with me.

An execution must also be made and given in, bearing the offi-  
cer's having delivered copies of the intimation to the precen-  
tors of all the parish churches within the shire, and their  
being affixed on the most patent door of the several churches.

O o o

No.



No. XXXVII. (Page 327.).

*Form of the Sheriff's annexing to the Writ the Return made by the Clerk to the Freeholders.*

THE return is made in the form of an indenture between the sheriff and clerk, in the following manner.

THIS indenture, made at \_\_\_\_\_ in a full court, or meeting of the sheriffdom thereof, holden the \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year of the reign of our Sovereign Lord, George the third, by the grace of God, King of Great Britain, France, and Ireland, betwixt an honourable man, A. B. Esquire, sheriff-depute (or substitute) of the said shire, upon the one part, and Mr C. D. clerk elected, to the effect under written, by the electors or freeholders of the said shire, on the other part, witneffeth, That, according to the form and tenor of the brieve, or writ, of our Sovereign Lord, the King, annexed to this indenture, proclamation having been lawfully made at the market-cross of the borough of \_\_\_\_\_ head borough of the said shire of \_\_\_\_\_ and at the respective parish churches within the same, as the custom is, the electors and freeholders of the said sheriffdom being met the day above mentioned, in the \_\_\_\_\_ of \_\_\_\_\_ and those who were there present being sworn or examined, according to the form, strength, and effect, of the several statutes made and provided thereanent, they unanimously (or by plurality of voices) elected and chose F. G. of H. knight, residing within the county, girt with a sword, habile, fit, and discreet, giving



giving and granting to the aforesaid knight full and sufficient power, for himself, and the whole community of the said shire, to do and consent to such things in parliament, as by the common council of the kingdom shall happen to be ordained upon the affairs aforesaid, specified in the said writ. In testimony whereof, to the one part of this indenture, remaining with the said A. B. to be annexed to, and returned with the writ, he the said A. B. and C. D. have set their hands and seals; and to the other part of the said indenture, remaining with the said C. D. for the use of the before mentioned shire, the said A. B. has also set his hand and seal, place, day, month, and year of God, and King's reign, aforesaid.

When there is only a return made to the sheriff of a member to represent the shire, there is wrote and signed by him, upon the back of the writ, as follows, 'The execution of the within writ is contained in an indenture hereto annexed.' If there is likewise a return of a burghers, the indorsement is in these words, 'The execution of the within writ is contained in certain indentures hereto annexed.'

No. XXXVIII. (Page 331.).

*Charter of Erection of the Borough of Ayr.*

WILLIELMUS, Dei gratia, Rex Scottorum, episcopis, abbatibus, comitibus, baronibus, justiciariis, vicecomitibus, praepositis, ministris, et omnibus probis hominibus totius terrae suae, clericis et  
 O o o 2 laicis,



laicis, salutem: Sciant presentes et futuri me, ad novum castellum meum super Are \*, burgum fecisse, et eidem burgo, et burgenfibus meis in eo manentibus, omnes libertates, et omnes liberas confuetudines concessisse, quas alii burgi mei, et mei burgenfes in eisdem manentes, per regnum meum habent: Affedi etiam in eo quolibet die Sabbati diem fori: Concessi etiam burgenfibus qui illuc venerint ad burgum meum inhabitandum, et ibi fedentes et manentes erunt, ut quieti fint a tolneo, et omni alia confuetudine, per totam terram meam, de dominicis cattallis fuis: Prohibeo itaque firmiter, ne quis in regno meo ab aliquo illorum tolneum, aut aliquam aliam confuetudinem de dominicis cattallis fuis exigat, fuper meam plenariam forisfacturam: Concessi etiam eidem burgo meo, et burgenfibus meis, qui in burgo illo fedentes et manentes erunt, quinque nummatas terrae, quae pertinent ad villam de Are, per divifas inferius fcriptas, fcilicet de Inverdon, furfum ufque in Innerpolecurteran, et de Innerpolecurteran, furfum ufque ad Crottun, et fic per Curcetan ufque ad caput Curcetan, et fic a capite Curcetan afcendendo per Boghefkin, ufque ad Monedamdereg, et fic a Monedamdereg per ficum, ufque in Monemethonac, et a Monemethonac per ficum, ufque in Polecleuan, et fic per Polecleuan ufque in Lochfergus, et a Lochfergus defcendendo ufque in Doufhat, et a Doufhat defcendendo per ficum ufque ad rivulum ex orientali parte Drumnefaneill, et a rivulo Drumnefaneill defcendendo ufque in ficum ex occidentali parte rivuli illius, et fic per ficum illum ufque in Polecloncoranguli, et fic per Polecloncoranguli ufque in Douffloch, et inde ufque in Pollemulin, et fic per Pollemulin defcendendo, ufque in Are, et fic per Are defcendendo, ufque in mare: Concessi, etiam burgenfibus meis ibidem manentibus, ut cum quolibet plaenario tofto fuo habeant fex acras terrae, quas de bofcho exterpaverint infra predictas

\* The Caſtle of Ayr was built by this Prince in 1197; *Chr. Mel.* 181. *Ford.* viii.



predictas quinque nummatas terrae, ad faciendum inde commodum suum: Redendo annuatim mihi, pro quolibet tofto, et sex acris terrae illi adjacentibus xii denarios: Mando itaque, et firmiter precipio, ut omnes homines qui cum mercantiis suis, ad vendendum et emendum ad illum praedictum burgum meum venerint, firmam pacem meam habeant, et forum exercent, et in bene et pace redeant. Precipio etiam firmiter, ut apud Mach et Kairnbught, et Loudun, et Croffanctoun, et Lachcalpine, tolneum, et aliae consuetudines quae burgo debentur, dentur, et recipiantur: Prohibeo itaque firmiter, ne quis tolneum, aut aliquam aliam consuetudinem, quas praedicto burgo meo de ratione facere debet, ultra predictas divisas asportare presumat, super meam plenariam forisfacturam. Si quis vero tolneum, vel aliquam aliam consuetudinem praedicti burgi mei, ultra praedictas divisas, asportare praesumpserit, precipio firmiter, ut omnes homines infra praedictas divisas manentes, sint auxiliantes fervientibus meis, ad adquirendum jus meum, et ad capiendum et attachiandum illum qui tolnea, aut aliquam aliam consuetudinem ad praedictum burgum meum pertinentem, ultra praedictas divisas asportaverit, vel asportare contenderet. Testibus Florentio electo Glasguen. cancellario meo, Waltero et Will<sup>o</sup> capellanis meis, Philippo de Valen. camerario meo, Roberto de Lundon filio meo, Will<sup>o</sup> de Bosch, et Hugone clericis meis, Will<sup>o</sup> de Valin, Thoma de Colvil, Reginaldo de Crawford, apud Lanarc xxi die Maii.



No. XXXIX. (Page 351.).

*Judgment of the Privy Council of Scotland respecting the Borough of Stirling.*

A N E N T the petition given in to the Lords of his Majesty's privy council be John Burd, late bailie of Stirling, and Robert Gibb merchant there, for themselves, and in name and behalf of the true Protestants and Presbyterians within the said burgh of Stirling, and Sir John Dalrymple of Stair, younger, his Majesty's Advocate, for his Highness interest, against Hew Kennedy, present pretended provost of Stirling, Alexander Chrystie, John M'Naw, and James Keir, bailies, Patrick Thomson deacon of the fleshers, and Thomas Cuthberd deacon of the glovers, and the rest of the town-council of the said burgh, shewing, That, where the continuation of any sett of people in the office of magistracy within any of his Majesties royal boroughs for longer than a year, and the inverting the ancient custom and election of magistrates and officers, and the threatening and menacing of any of the electors, and the endeavouring to pre-occupy and subdue the crafts and their deacons, by taking them obliged not to vote but for such and such persons, and the contempt of the Lords just commands, are crimes of a hye nature, and severely punishable, and particularly by the 29th act, parliament 5th, James III. whereby it is ordained, that the officers in burghs be not continued furder then a year, and that the old council should first choise the new, and then both old and new choise the officers; and by the 108 act, parl. 14. Ja. III. it is appointed, that the election of officers in burghs be without partiality or mastership, especially  
when



when the continuation of such persons in the magistracy is managed and carried on by persons solemnly engaged upon oath not to continue, or be continued in the magistracy above the space of two years, and when the same is done contrair to an act of counsell of the said burgh, after *a solemn decision of the Lords of Session, finding that the 29th act of parliament 5th, James III. was not in disuetude, and therefore have found and declared, that no person should be continued by election in the magistracy of the said burgh longer than two years at once*; nevertheless it is of verity, that, upon a representation made by the petitioners against Hew Kennedy, pretended provost of Stirling, and his accomplices, as men that had purchased, by letters and recommendations of them to the late King James, the places of trust, and government of the town, as most proper and fit instruments to carry on his Popish and arbitrary powers that were then on foot, and who thereafter most unwarrantably and illegally, for continuing themselves in the magistracy and government of the said place, did not only hinder and marr the free election appointed by the meeting of estates, to have been made by the community of the said burgh, in the month of June last, but also, by evil practices, obtained themselves to be continued in their former usurpation, notwithstanding of the several protestations taken by the petitioners against them thereanent, whereupon they did exhibit and present to the estates of parliament ane bill of complaint against them, to which they still adhere: As also, they have of new, at this last election, persisted in their former, and worse evil practices, to obtain themselves perpetuate, and continued in the magistracy and government of the burgh, with ane express, avouched, and declared design, that no Presbyterian should ever enter in the government with them, to the manifest wrong of the fellow citizens, and the stirring up of an factious tyranny, to the ruin of the said burgh, and the prejudice also of the security and policy of the whole kingdome; whereupon the Lords, by their act, of date the

21st



21st of September last, after consideration of the foresaid representation, did ordain the said magistrates to allow the petitioners to see the list of the persons that were to be chosen magistrates, counsellors, and deacons of crafts at Michaelmas last, and also allowed them to be present the time of the said election, and take instruments against any illegal procedure therein, in case the same should be used by the present magistrates in the election, that the Lords might take the same to their consideration, as the said act, of the date foresaid, in itself more fully bears; according to which ordinance, the petitioners John Burd and Robert Gibb did appear the day of the said election, in presence of Hew Kennedy, pretended provost of Stirling, Alexander Chrystie, John Macnaw, and James Keir, baillies, James Russell, late dean-of-guild, James Baird counsellor, and others present, and made their objections and protestations upon the several gross illegalities there practised, as instruments taken thereupon therewith produced will testify. Whereupon, and conform to the Lords ordinance, and not to mention all the particular miscarriages that there occurred, the petitioners humbly report and represent, that the procedure of the said election was most illegal, in so far as, *1mo*, That, albeit the petitioners did timeously intimate and shew to the said Hew Kennedy, pretended provost, the council's order, appointing them to see their lists, and that they had required him to give the same, yet they were shifted and put off, and had no communication thereof till within an hour of making the election, which was plain illusion, in contempt of the council's authority. *2do*, And albeit there be an express act of council of the said burgh, dated the 22d of September 1679 years, that none of the magistrates thereof should continue longer than two years at once, and that each counsellor, at his admission, should swear not to infringe the said act, and neither to continue himself, nor to vote to the continuation of any other, which act is still in good observance; and this same pretended Provost Kennedy, Alexander



ander Chrystie, John Macnaw, and James Keir, the present pretended bailies, and Patrick Thomson deacon of the fleshers, and Thomas Cuthberd deacon of the glovers, the present pretended deacons have, *de facto*, sworn the said oath, as appears by the books of the said burgh; and, though this was represented by the petitioners at the said election, yet the said pretended provost and bailies, and all that voted for them, did noways regard the same, but have manifestly broke the said act; and the saids pretended provost and bailies plainly perjured themselves, in so far as this is now the fourth year that the said Hew Kennedy, pretended provost, doeth most wrongously continue in the said office, and most of the pretended bailies and counsellors have, contrary to their oath, voted for their continuation. *3tio*, Because there being a decret of declarator given and pronounced by the Lords of Session, *in foro contradictorio*, upon the 27th of January 1681, anent the rights and privileges of the said burgh, they expressly therein found, that the act James III. parliament 5. cap. 29. 'Ordaining, 'That officers in burghs be not continued farder then a year, was 'not in disuetude, and, therefore, that no person should be continued, by election, in the magistracy of the said burgh longer 'than two years at once;' as the said decret insisted upon and objected at the said election, bears: Yet nevertheless, contrary to the said act of parliament and the said decret, the said Hew Kennedy, pretended provost, is continued in the fourth year, as said is, whereby it is manifest, that the foresaid election was most illegal and unwarrantable. *4to*, Because the foresaid election was no ways free, in sua far as the said Hew Kennedy, pretended provost, with his accomplices and his emissaries, did threaten the electors, particularly James Grame, the conveener, and manifestly endeavoured to pre-occupy and suborn the crafts, and their deacons, and others, by taking them obliged not to vote for any Presbeterian, but to vote for their leittis, or as they should hear them vote; which accordingly

P p p

was



was done, and the freedom and legality of the said election thereby quite spoiled. And, *lastly*, that, albeit be the foresaid act of parliament, and decret of declarator following thereon, with the constant and uninterrupted customes and sett of the burgh, it be provided, that the old council being filled up, shall first choise the new, and that then both old and new shall choise the magistrates and officers, which is also confirmed by the dayley practice of all the elections since syne; yet it is most certain, that, at this last election, the old council, without filling up the vacancies therein, did first choise the new counsellors, and then, getting them to their mind, did associate the new counsellors with themselves, and voted for the supplying of the four vacancies in the old council, that so the whole might be better packt to carry on their foresaid illegal election: And albeit the late and present magistrates and council of the said burgh were obliged, and did take the oath of alledgance, yet the samen was done and taken by them, and allowed and approved by the administrators thereof, to be taken by them by an particular qualification and restriction to their own mind and explanation; to wit, that they were no longer bound by that alledgance to their present Majesties then they were able to protect them, which is expressly contrair to the act of parliament, and the duty of all loyal subjects within the kingdome; and yet such is their disloyaltie, that they have frequently since syne vaunted and asserted, that they only took the said oath of alledgance with the foresaid restriction and qualification; and, notwithstanding of the foresaid guilt, and of all their illegal procedures, and of the instruments taken by the petitioners against the late magistrates and town-council, they proceeded to a new election, wherein they elected and choised several of the persons above named, that thereby they might continue that sett of people in the magistracy and council, and also, elected Christopher Russel bailie, and Robert Allan merchant-counsellor, who, as well as the hail forenamed persons, (James Macnair  
only



only excepted), had taken the oath not to infringe the said act of council, and neither to continue themselves, nor to vote to the continuation in, of any other contrary thereto, and who also, with the said James Macnair, James Russell, Robert Russells, elder and younger, late counsellors, have endeavoured to suborne and menace the electors; wherethrow the persons above named are guilty of, and have incurred the certification contained in the foresaid acts of parliament, act of town-council, (for observing whereof, they, or most of them, are solemnly engaged by their oaths), and decreet of declarator above mentioned, and they are guilty of an open and manifest contempt of authority, and of inverting the ancient custom and manner of election of the said burgh, and of threatening and menacing of the electors, and of endeavouring to preoccupie and suborn the crafts, and their deacons, and misinterpreting their Majesties laws, and of an manifest riot and oppression, to the violation of the publick peace; and therefore ought to be found and declared, that the foresaid election of the present pretended magistrates and town-council of Stirling was illegal, and contrary to the laws of this kingdom, and the particular statutes and constitutions of that burgh, and ought to be declared void and null, and the persons above named, whether in the old or new council, to be declared incapable to elect, or be elected for this year, but also, to amerciat and fyne ilk ane of them in the sum of

and to be otherwise punished in their persons and goods, to the terrour of others to do and commit the like in time coming: And a-nent the charge given to the forenamed persons, defenders, be special warrand of the saids Lords, to have compeared before them at ane certain day, to have answered to the ground of the above written complaint, and to have heard and seen the foresaid election declared void and null, and a new free election to be made, in such manner, and at the sight of such persons as the Lords should appoint to oversee the samen, and that none of the foresaid persons



might be capable either to elect or be elected this present year, and to have heard and seen such order and course taken thereanent as the Lords should think fit, and to have brought with them, exhibited, and produced, in presence of the saids Lords, the foresaid decret of declarator, and records of the town-council, as the warrand for the citation and execution of the charge given thereupon more fully bears: The said John Burd and Robert Gibb, pursuers, comparand personally, with concourse of his Majesty's Advocate, for his Highness interest, and Mr Richard Douglas, and Mr David Forbes, advocates, their procurators; and the saids defenders comparand also personally, with Sir Patrick Home and Sir William Lockhart, advocates, their procurators, who produced and gave in answers to the said lybell: The Lords of his Majesties privy council having considered the above libel and complaint, and answers made thereto, and heard both parties, and their procurators at the barr, and having also considered the acts of parliament made anent the election of magistrates and officers of burghs, with the act of the town-council of Stirling, produced, and the said Hew Kennedy, his acknowledgement that he had been two years in the magistracy immediately before the time he was elected provost of the said burgh by the poll, be virtue of the act of the committee of estates, they find, that the two years he was in the magistracy, be the late King's nomination, must be computed as the two years allowed to him by the act of parliament and act of the town-council, to exercise and officiat as magistrate; and therefore Finds, that he cannot be continued as provost of Stirling, and declares the election made at Michaelmas last to be void and null, as to him, and delayed the consideration of the libel, as to the rest of the defenders, until the next day. And the saids Lords having likewise considered the libel against the rest of the defenders, they find the contravention of the act of parliament of King James III. anent the election of magistrates, or the contravention of the sett, and acts of the town-council



cil made thereanent, or the menacing or threatening of the electors relevant, *separatim*, and remitted to a committee of their own number to examine the witnesses, and ordained the town-books to be produced, with power to the said committee to consider the said matter, and to report; and delayed, at that time, to consider that point of the libel, as to the qualification and restriction with which the defenders took the oath of alledgance, in respect his Majesty's Advocate was not present; and the witnesses cited having appeared at the barr, and made faith, and having thereafter appeared, in presence of the said committee, and being solemnly sworn, examined, and interrogat upon the points of the libel admitted to the pursuers probation, deponed in manner mentioned in their oaths and depositions, as the samen extant in process bears; and the saids Lords having considered the depositions of the witnesses adduced, with the decret of declarator above mentioned, and acts of the town-council contained in the town court-books, produced by the town-clerk, they Find the contravention of the act of parliament of King James III. anent the election of magistrates, and the contravention of the sett, and acts of the town-council made thereanent verified and proven; and therefore Find, that the election of Stirling at Michaelmas last was illegal, and contrair to the custom, laws, and sett of the said burgh; and therefore declares the samen void and null in itself, and the haill defenders incapable either to elect, or be elected, as magistrates and counsellors for this ensuing year; and ordains the remanent of the old council, consisting of fourteen old magistrates and counsellors, to meet and fill up their vaccancies, and compleit their council to twenty-one again, and thereafter proceed and elect new counsellors and magistrates as at Michaelmas, conform to the sett and laws of the said burgh, these always hereby declared incapable, being none of them that are to be chosen.

No.



No. XL. (Page 360.).

### Warrant for a Poll Election in the Borough of Anstruther Wester.

*At the Court of St James's, the 26th day of June 1767,*

P R E S E N T,

*The King's most excellent Majesty in Council.*

W H E R E A S there was some time since presented to his Majesty, at this board, a petition of Robert Robb, and others, burgessees, heritors, and inhabitants, of the borough of Anstruther Wester, in North Britain, praying, That his Majesty would be graciously pleased to grant warrant for making an election of magistrates and counsellors for the said borough, by a general poll of such resident burgessees, heritors, and inhabitants, paying, and liable in public burdens within the same; and likewise a petition of Robert Hunter, and other burgessees and heritors of the same borough, praying, That his Majesty would be graciously pleased to order a warrant in council for restoring the magistracy and town-council of the said borough, by a poll election of the burgessees resident in the burgh, and heritors bearing part of the public burdens, excluding honorary burgessees, servants, and pensioners of the town: His Majesty having taken the same into consideration, and received the opinion of his Majesty's Attorney General, the Lord Advocate of Scotland, and his Majesty's Solicitor



Sollicitor General, thereupon, is pleased, with the advice of his privy council, to order, That, for the restoring the peace and good government of the said borough, the inhabitant burgeses of the said borough, who resided there on the 18th day of September 1765, and heritors who, on the said 18th day of September 1765, were liable in, and did bear a part of the public burdens of the said borough, (excluding honorary burgeses, servants, and pensioners, of the town, or of any corporation within the same, and others who are now, or shall be, under any legal incapacity of acting at such election), be, and they are hereby authorised and commanded to assemble themselves at the council chamber, within the said borough of Anstruther Wester, at ten o'clock in the forenoon, upon Wednesday the 15th day of July next, with continuation of days, of which the sheriff-depute of Fife-shire is hereby required to give public notice eight days before the day of election, then and there to elect fit persons, (not exceeding fifteen in number, being the number elected at Michaelmas 1764), properly qualified in terms of the set and usage of the said borough, to be magistrates and town counsellors of the same; and that the persons so to be elected by a majority of the burgeses resident in the said borough, on the said 18th day of September 1765, and heritors aforesaid, shall continue from that time magistrates and counsellors till the usual time of election in the current year, 1767; and that all persons claiming to vote as burgeses, do give their burges tickets, or authentic extracts from the records of this borough, of their admission to the freedom thereof; and that the said heritors do likewise give in certificates, under the hands of the collector of the public burdens of the said borough, or other satisfactory evidence, of their being liable in, or bearing a part, on the said 18th September 1765, in respect of the lands and tenements upon which they shall claim a right to vote at the poll election, and that they are then liable in, and do bear a part of the public burdens of the said borough of Anstruther Wester, six days  
at



at least before the day of election, to the said sheriff-depute, or his clerk, that their names may be called before the election: And that the sheriff-depute of Fifeshire, (within which the borough lies), the sheriff-depute of Perth-shire, and the sheriff-depute of Mid-Lothian, being the two adjoining counties to Fife-shire, or any two of them, be, and they are hereby authorised and required to attend, oversee, and direct, such election, according to law, and the rules used to be observed in such cases, and to form an authentic instrument thereupon under their subscription manual, to be reported to his Majesty in council, for his royal confirmation; and that they do administer to the electors, before they be admitted to poll, the oaths appointed by law to be taken in Scotland, by the electors, at ordinary elections of magistrates, and likewise the oath against bribery and corruption, if required by any person having a right to vote at the said election. Of all which the persons aforementioned, and all others whom it may concern, are to take notice, and pay due obedience hereto.

No. XLI. (Page 360.)

*Precept from a Sheriff to a Borough.*

A. B. Esquire, sheriff-depute (or substitute) of the  
 county of \_\_\_\_\_ to  
 the magistrates and town-council of the borough of \_\_\_\_\_  
 Whereas, by a writ of election to the parliament to be holden at  
 Westminster on the \_\_\_\_\_ day of \_\_\_\_\_  
 directed to me, and bearing *teste* the \_\_\_\_\_ day  
 of \_\_\_\_\_ I am commanded, that, of every royal  
 borough



borough of the aforesaid county, I freely and indifferently cause to be elected one commissioner, to elect one burges of the most discreet and sufficient, for the class or district, according to the form of the statutes thereupon made and provided, as in the said writ, at more length, is contained: Herefore, I require and ordain you, that, with all convenient speed, ye freely and indifferently elect one commissioner, (in the same manner as you was in use to elect commissioners to the parliament of Scotland), in order to elect a burges for the class or district of boroughs whereunto your borough does belong, of the more discreet and substantial men; and that ye order the said commissioner, so to be elected by you, to repair to the presiding borough of the said class or district, upon the day of (being the thirtieth day from the *teste* of the said writ), and then and there to elect the said burges to parliament, according to the form of the statutes thereupon made and provided, and in terms of the said writ. Given under my hand and seal, at the day of seventeen hundred and years, and of his Majesty's reign the year.

No. XLII. (Page 363.).

*Commission from a Borough to a Commissioner or Delegate to vote for a Burges to serve in Parliament.*

IN a council of the borough of holden  
in the court-house thereof, being the ordinary place where the council uses to sit, the day of  
Q q q one



[illegible]



of instant, with the rest of the commissioners chosen for the several boroughs of this district, and there to vote for and elect a burges of the said class or district, out of the discreetest and most sufficient, freely and indifferently to represent the said district in the parliament of Great Britain, appointed to be held at Westminster the said day of next, promising to hold firm all and whatever things their said commissioner does in the premisses; and ordain the clerk to give out an extract of the above commission, and to affix the seal of the borough thereto. Extracted forth of the council record, and the seal of the borough is hereto affixed by me,

(Signed)

Clerk.

No. XLII. (Page 378.).

*Indenture between a Sheriff and a Clerk of a presiding Borough.*

THIS Indenture, made at the borough of the day of one thousand seven hundred and years, and of the reign of our Sovereign Lord, &c. the year, betwixt A. B. Esq; sheriff-depute (or substitute) of the shire of on the one part, and C. D. common clerk of the borough of and clerk to the election of a burges to serve in parliament for the class or district after mentioned, specially appointed to make the return of the said election, conform to the statutes made on that behalf, on the other part, witnesseth, that, by virtue of his Majesty's writ of election, bearing *teste* the day of last, directed to the sheriff of the said shire of and to the sheriffs of the shires of and and of the said sheriffs, their several precepts thereupon, directed to the boroughs of for choosing each of them a commissioner or delegate, to the effect

Q q q 2

under-



underwritten, and ordering the respective commissioners to meet at the said borough of \_\_\_\_\_ as the presiding borough for the time, of the class or district of boroughs above mentioned, upon the day and date of these presents, being the thirtieth day after the *teste* of his Majesty's writ of election aforesaid, and to choose a burges for the said district to represent them in the ensuing parliament, to be holden at the city of Westminster upon the \_\_\_\_\_ day of \_\_\_\_\_ next: The commissioners chosen for the boroughs aforesaid, being this day met in the council-house of the said borough of \_\_\_\_\_ the presiding borough at the said election, did, by an unanimous vote (or by a majority of votes) of the said commissioners, who produced commissions duly authenticated, freely and indifferently choose and elect E. F. Esquire, a burges of the borough of \_\_\_\_\_ to attend and serve in the ensuing parliament of Great Britain, for the said class or district of boroughs above mentioned, giving and granting to the said E. F. full and sufficient power for himself, and the commonalty of the said class or district, to do and consent to those things which then and there shall happen, by the common council of the kingdom, (by the blessing of God), to be ordained upon the affairs mentioned in the said writ. In witness whereof, to the one part of these presents remaining with the said A. B. Esq; to be annexed to, and returned with, his Majesty's writ of election, directed to the sheriff of the said shire of \_\_\_\_\_ he the said A. B. and C. D. have set their hands and seals; and to the other part remaining with the said C. D. for the use of the district of boroughs before mentioned, the said A. B. has also set his hand and seal, place, day, month, year of God, and King's reign aforesaid \*.

No.

\* When a burges is to be chosen to supply a vacancy happening during the course of a parliament, there is necessarily an alteration in the form of the sheriff's precept, of the commissions granted by the several boroughs to their commissioners or delegates, and of the indenture between the sheriff and the clerk of the presiding borough.



## No. XLIII. (Page 397.).

*Commission to John Bell to the Parliament for the Borough of Glasgow, 1681.*

BE it knoune to all men be thir present lres, us the proveist, baillies, and counsell of the burgh of Glasgou: Forfuameikle as the King's most excellent Majestie hes, by his proclamatioune, given at Whythall the eight of Junii last, having indytte ane parliament to be holdin att Edinburgh ye twentie-eight of Julii jaivi, &c. eightieane yeares, does requyre and command all Archbischops, Dukes, Marqueises, Earles, Viscounts, Lords, and Officers of Stait to be pnt and attend that dyett, and all the schirreffs in the rexive shyres, and their deputs, to call and conveyn all the frieholders in the rexive shyres, to the end, that, according to ye lawes and acts of parliament, elections may be made of fitt perones to be commissiouners for the said parliament; as also, the royall burroughs to mack choyse of commissiouners accordingly, and them, and all perones having interest, to attend the said parliat, under ye paines conteined in the lawes made thereanent, as the said proclamatioun beires: Wherfor, and in obedience to the said proclamatioun, to have nominated, constituted, and appointed, as we the said magistrats and counsell of ye said burgh of Glasgou nominat, constitut, and appoynt John Bell, present proveist of the said burgh of Glasgou, our laull commissiouner for the samyne burgh to the said parliament, giving, granting, and committing to him our full, frie, plaine power, exprefs bidding, mandament, and charge for us, and in our names to meit and conveyn with ye remanent commissiouners of parliament att  
the



the said burgh of Edinburgh the said twentie-eight day of Julii nixt, and there to sitt, treat, vott, and conclud upon all and everie heid, poynt, and artickles fall happin to be proponed in the said parliat, in sua far as may concerne the honor and faiffie of ye King's most excellent Majestie, ye good of his service, and the peace of this his Majesties kingdome, and generallie all and sundrie uyr things neidfull to be done, to doe and exerce yranent, holding firme and stable all and qtsomever our said commissioner does in the premisses. In witnes qrof, thir pntis are sub<sup>t</sup> be George Anderfone, our commounetoune-clark, att our command, att Glasgou this twentie-fyft day of Junii jaivi, &c. and eightie-ane yeares, the commounetoune seall of office of the sd burgh is heirto affixit. (Signed) G. ANDERSONE.

The seal is affixed, and is perfectly distinct.

No. XLIV. (Page 401.).

*Letter by King Charles II. to the Royal Boroughs, dated July 3. 1674.*

CHARLES R.

TRUSTY and well beloved, we greet you well, as we have, upon all occasions, since our happy restauration, given testimony of our care to maintain the just right and priviledges of all our good subjects of that our ancient kingdom, so we are resolved particularly to maintain and support our royal burrows in their immunities; and being informed, that, of late, an innovation hath been brought in amongst them, by electing commissioners, and sending them from severall burghs to serve in parliament, conventions, and at their own particular



particular and general conventions and meetings, who are not actual residents within these burghs commissionating them, nor bearing proportional charges with them, or such as can lose or gain in any of their concerns, which, as we are informed, are directly contrair to the ancient constitution of the burghs, and to many of their acts: Therefore we have thought fit to require you to take special care that your ancient custom concerning this matter be revived and maintained, and the like abuses to be prevented for the future; so we bid you heartily farewell. Given at Hampton Court the third of July 1674, and of our reign the twenty-sixth year.

No. XLV. (Page 403.).

*Act of the Convention of Royal Burghs in July 1675.*

THE general convention of burghs having taken to their serious consideration the many abuses and inconveniencies that has happened to the estate and interests of the royal burrows, in electing commissioners to parliaments, conventions of estates, and to their own general and particular conventions and meetings, such persons as are not merchants, trafficquers, residents, bearing common burden with the rest of the inhabitants, and who cannot lose nor gain in the concern of the burrows, which, as it was contrair to many of their acts, and particularly to the acts of burrows, holden at Edinburgh the 15th of July 1574, and to the act at Couper the 3d day of May 1586 years, and to the act at Glasgow the 1st day of July years, and to several other acts of burrows, and to the ancient and primitive constitution of the burrows by their first erection, so likewise it is destructive to their interest, which is to be an intire  
and



and unanimous body among themselves, making a third distinct estate of the kingdom, without being mixt with persons of another rank or quality, than of the merchant estate, who usually carries on rather collateral designs, than the direct, true, and solid interest of royal burrows, whereby they become divided, and loses their chief interest and strength, which consists in their unanimity, and consequently the contempt and ruine of the burrows follows, as too sad experience manifests: Sicklike, taking to their serious consideration His Majesties princely care and zeal for the preservation of the privilege of the royal burrows, contained in his last gracious letter directed to their general convention at Stirling, of the date the 3d of July 1674, requiring them, that they take special care that their foresaid acts anent the said matter may be revived and maintained, and the like abuses prevented for the future: Therefore the said general convention, by thir presents, revives all preceding acts of burrows, ordaining commissioners for parliament, convention of estates, and to the general and particular meetings of the burrows, to be of persons conform to the qualifications foresaid, and that in all the heads, points, and clauses of the said acts, which for brevities sake are holden as herein repeated; but also of new statutes, enacts, and ordains, in all time coming, and which is to be observed as an inviolable rule, conform whereunto all future elections shall be made, that no person shall be elected or chosen commissioners by any of the royal burrows to particular conventions of estates, and to the particular and general meetings of the burrows, but such persons who are merchants, traffickers, present residents within the burgh commissionating them, and who bears common burden with the rest of the inhabitants, and are such persons who can gain and lose in the concerns of the burrows: Declaring, likeas it is specially declared, that all elections of commissioners to particular conventions of estates, and to the particular and general meetings of the burrows, made of persons not qualified, as  
aforesaid,



aforesaid, to be, *ipso facto*, void and null, and of no force, strength, nor effect in time coming; as likeways declaring, that every person who shall vote for such illegal and unwarrantable elections, shall lose the freedom of the burgh where he is a burges and inhabitant; and further certifying, that every particular person accepting of such a commission not being qualified, shall be lyable in pain and penalty of 1000 merks as oft, and sua oft as they transgress this present act, and for the which fine and penalty they shall have no relief from the burgh, but shall pay the same out of their own proper means and estate. And for the better and more punctual performance and execution of this present act, the convention ordains, that this clause shall be added to the oath *de fidei*, which is to be taken of every burges of every royal burgh within the kingdom, at his admission to be a counsellour of their respective burghs, viz. that he shall not, in any time coming, vote nor consent to the choosing of any person to be commissioner from the royal burrows to parliaments, conventions of estates, and to the general and particular meetings of burrows, but such persons as are qualified in manner foresaid: And further, ordains their common agent present or to come, to raise letters of horning hereupon, for charging the haill royal burrows of this kingdom to make their elections of commissioners of parliaments, conventions of estates, and to their general and particular conventions and meetings, when the samen shall occur, conform to the qualifications foresaid, under the pain of rebellion, and putting of them to the horn, if they failzie: And sicklike, ordains the said agent to raise other letters of horning, charging every particular person who shall hereafter vote for such unwarrantable elections, or such as shall accept of such unwarrantable commissions, not being qualified, as said is, to make payment to him, for the common use of the burrows, the foresaid penalty of a thousand merks, as oft and sua oft as they shall transgress thir presents, and that under the pain of rebellion,

. R r r



bellion, and putting of him to the horn, whereanent thir presents shall be a warrant.

No. XLVI.

*Proclamation for Dissolving a Parliament of Great Britain, and declaring the Calling of another.*

GEORGE R.

W H E R E A S we have thought fit, by and with the advice of our privy council, to dissolve this present parliament, which stands prorogued to the day of we do for that end publish this our royal proclamation, and hereby dissolve the said parliament accordingly; and the Lords Spiritual and Temporal, and the knights, citizens, and burgeses, and the commissioners for shires and boroughs, of the House of Commons, are discharged from their meeting and attendance on the said day of

And we being desirous and resolved, as soon as may be, to meet our people, and have their advice in parliament, do hereby make known to all our loving subjects, our royal will and pleasure to call a new parliament; and do hereby further declare, that, with the advice of our privy council, we have this day given order to our Chancellor of Great Britain to issue out writs in due form for calling a new parliament, which writs are to bear *teste* on the day of



of ~~the~~ and to be returnable on  
the day of next.

Given at our court, &c. the day  
of &c.

No. XLVII.

*Warrant for Issuing Parliamentary Writs.*

GEORGE the Third, by the grace of God, &c. To our right  
trusty and well beloved

Lord High Chancellor of our kingdom of Great Britain, greeting :  
Whereas we, by the advice of our privy council, for certain and  
urgent causes concerning us, the good estate and commonwealth of  
this our realm, and of the Church of England, and for the good  
order and continuance of the same, have appointed and ordained a  
parliament to be holden at our city of Westminster, the

day of next ensuing, in which case, diverse and  
fundry writs are to be issued forth, under our great seal of Great  
Britain, as well for the prelates, bishops, and nobility, of this our  
realm, as also for the election of knights, citizens, and burgessees, of  
the severall counties, cities, and boroughs and towns of the same, to  
be present at the said parliament, at the day and place foresaid ;  
whereupon we will and command you forthwith, upon the receipt  
hereof, and by warrant of the same, to cause such, and so many,  
writs to be made, and sealed, under our great seal, for the accom-  
plishing of the same, as in like cases hath been heretofore used and

R r r 2

accustomed.







No. XLIX.

*Proxy by a Peer to another Peer to act and vote for him in the House of Lords.*

OMNIBUS Christi fidelibus ad quos præsens script. pervenerit,

salutem; Noveritis me præsens per licentiam serenissimi Dni nri Georgii Secundi, Dei gra. Mag. Britan. Franc. et Hibnie Regis, fidei defensoris, &c. a parliament. suo tent. apud Westmr 22<sup>o</sup> die Novrs, anno regni dicti Dni Regis decimo 7<sup>o</sup> sufficienter excusat. abesse, nominare, ordinare, et constituere dilect. mihi in Christo prænobilem et honorand. virum

meum verum certum et indubitat. factor. actor. et attornat. seu procurator. præsentes, eidemque procuratori meo dare et concedere, plenam potestatem et auctoritatem pro me et nomine meo, de, et super quibuscunque causis et negotiis in præsenti parliament. exponend. declarand. seu tractand. tractatibusque inibi factis, seu faciend. concilia, nomine meo impendend. statutisque etiam et ordinacoibus, quae ex maturo et deliberato iudicio Dnor. tam spirit. quam temporat. in eodem parlamento congregator. enactitari, seu ordinari contigerint, nomine meo consentiend. eisdemque (si opus fuerit) subscribend. ceteraque omnia et singula, quae in praemissis necessarii fuerint, seu quomodolibet requisit. faciend. et exercend. in tam amplis modo et forma, prout ego ipse facere possem aut deberem, si præsens personaliter interesssem, ratum et gratum habens, et habiturus totum, et quicquid dict. procurator meus statuerit, aut fecerit in praemissis.

In



In cujus rei testimonium presentibus subscripsi, sigillumque meum apposui. Dat. apud anno rni dicti Regis, decimo,  
annoque Dni 1743.

N. B. The foregoing proxy is taken from a copper-plate sent from the parliament office in November 1743.

No. L.

*Letter of Proxy from a Temporal Lord in the reign of Henry VIII.*

EXCELLENTISSIMO et potentissimo Principi ac Domino, Domino Henrico octavo, Angliae Regi metuendissimo, fidei defensori, et Domino Hiberniae, vester humilis Thomas West, Dominus Laware, omnem felicitatem votivam cum honore, in eo per quem reges regnant, et Principes dominantur. Quoniam in presenti parlamento vestro, serenissime Rex, apud civitatem London summonito et tento, juxta vestrum mandatum, certis ex causis rationabilibus vestrae serenitati regiae ostensis, personaliter interesse non valeo; ideo, ex vestro graciofo favore Regio, ad comparandum pro me, et nomine meo, in predicto parlamento, praenobiles viros Johannem Audeley militem, Dominum Audeley, et Thomam Berkeley militem, Dominum Berkeley, meos veros, et indubitatos conjunctim et divisim procuratores, ordino et constituo, ad tractandum et communicandum, necnon ad consentiendum, vice et nomine meis, unacum praelatis, magnatibus, et proceribus, dicti regni vestri, super quibuscunque arduis, et urgentibus negotiis, vos, statum vestrum, et defensionem regni vestri, ac rei publicae concernentibus, ratum, gratum



tum et firmum habiturus, quicquid dicti mei procuratores fecerint, aut eorum alter fecerit in premissis, seu aliquo premissorum. In cujus rei testimonium, sigillum meum presenti procuratorio apposui, apud Clappham, xi die mensis Novembris, anno regni vestri xxi.

## No. LI.

*Letter of Proxy from a Spiritual Lord in the reign of Henry VIII.*

EXCELLENTISSIMO et potentissimo Principi ac Domino, Domino Henrico octavo, Angliae et Franciae Regi metuendissimo, necnon totius ecclesiae Anglicanae capiti supremo, et Domino Hiberniae, vester humilis et fidelis subiectus, Thomas, abbas monasterii Sancti Johannis Colcestriae, omnem felicitatem votivam cum honore, per quem Reges regnant, et Principes dominantur. Quoniam in presenti parlamento vestro, serenissime Rex, apud civitatem London summonito et tento, juxta vestrum mandatum, certis ex causis rationabilibus vestrae serenitati regiae ostensis, et gracie acceptatis, personaliter interesse non valeo: Ideo, ex vestro graciofo favore regio, ad comparandum pro me, et nomine meo in praedicto vestro parlamento, praenobiles viros Comitem Oxoniae, et Comitem Suffexiae, necnon reverendos patres, Abbatem Sancti Edmundi de Buria, Abbatem de Hyda, et Abbatem Sancti Benedicti de Hulmo, meos veros et indubitatos procuratores conjunctim et divisim ordino et constituo, ad tractandum et communicandum, necnon consentiendum vice et nomine meis, una cum prelati, magnatibus, et proceribus dicti regni vestri, super quibuscunque arduis et urgentibus negotiis, vos, statum vestrum, et defensionem regni vestri et reipublicae concernentibus, ratum, gratum, et firmum habiturus, quicquid dicti  
mei



mei procuratores fecerint, aut eorum alter fecerit in premissis, seu aliquo premissorum. In cujus rei testimonium, sigillum officii nostri presenti procuratorio meo apposui. Datum primo die mensis Februarii, anno regni Regis nostri prenominati vicesimo septimo.

N. B. The two foregoing letters of proxy are taken from Maddox's Formulæ Anglicanum, pag. 353.

### No. LII.

*Deputation by the Lord Steward of his Majesty's household for administering the oaths to the Members of the House of Commons.*

WILLIAM Earl of Lord Steward of his Majesty's household, and one of his Majesty's most honourable privy council, to all to whom these presents shall come, Know ye, That I the said Lord Steward, by virtue of my said office of Lord Steward, have constituted, named, and appointed, and, by these presents, do constitute, name, and appoint, (about three score and fifteen noble-men and gentlemen), or any six, five, four, three, two, or one of them, my deputy and deputies, in my place and stead, to tender and administer the oaths mentioned in a statute made in the first year of the reign of their late Majesties, King William and Queen Mary, intituled, 'An act for removing and preventing all doubts and disputes concerning the assembling and sitting of this present parliament,' according to the directions of the said statute, and of all and every other statute, and statutes, directing the taking the said oaths before me, to all and every person, and persons, who is, are, or shall be elected or appointed a knight, citizen, burgess, baron, of any of the



the five ports, or commissioners for the shires or boroughs of the present parliament, appointed to meet the day of and to take and receive the oaths of all and every the said person and persons, who is, are, or shall be elected or appointed a knight, citizen, burgess, baron of any of the five ports, or commissioners for the shires or boroughs aforesaid, for the said parliament: Also, to tender and administer the oath mentioned in a statute made the seventh year of the reign of his late Majesty, intituled, 'An act for the better regulating the election of members 'to serve in the House of Commons for that part of Great Britain 'called Scotland, and for incapacitating the judges of the court of 'session, court of justiciary, and barons of the court of exchequer in 'Scotland, to be elected, or to sit or vote as members of the House 'of Commons,' according to the directions of another statute, made in the sixteenth year of his late Majesty's reign, directing the said oath to be taken before me, to all and every person and persons, who is, are, or shall be, chosen a member to serve in parliament for any shire or stewartry within that part of Great Britain called Scotland, and who was not, were not, or shall not, be present at the meeting of election: And to take and receive the oath of all and every such person and persons, giving them, my said deputies, six, five, four, three, two, or one of them, full power and authority to execute and perform the matters herein before mentioned: Ratifying and confirming all and whatsoever my deputies, or deputy, shall lawfully do and perform in this behalf, in as ample, perfect, and full manner, as if I myself had personally been present, and done the same. In testimony whereof, I the said Lord Steward have hereunto set my hand and seal, this day of in the reign of, &c. and in the year of our Lord, one thousand seven hundred and

Sealed and delivered, being first duly stamped, in the presence of

S. f. f.

No.



## No. LIII.

*List of the Shires in Scotland, according to the order in which they were called in the Scottish Parliaments.*

|                |                    |
|----------------|--------------------|
| Edinburgh      | Aberdeen           |
| Haddington     | Inverness          |
| Berwick        | 20. Nairn          |
| Roxburgh       | Cromerty           |
| 5. Selkirk     | Argyle             |
| Peebles        | Fife               |
| Lanerk         | Kinross            |
| Dumfries       | 25. Forfar         |
| Wigtoun        | Banff              |
| 10. Air        | Kirkcudbright      |
| Dumbarton      | Sutherland         |
| Bute           | Caithness          |
| Renfrew        | 30. Elgin          |
| Stirling       | Orkney and Zetland |
| 15. Linlithgow | Clackmannan        |
| Perth          | Ross               |
| Kincardine     |                    |



THE  
STATUTES AT LARGE,

RELATING TO

The Election of Peers and Commoners for Scotland.

JAMES I. PARLIAMENT III. 1425. CAP. 52.

*That all Prelates, Baronnes, and Freeholders, sall compeir personallie  
in the Parliament.*

**I**TEM, it is ordained and statute, that all Prelates, Erles, Baron-  
nes, and Freeholders of the King, within the realme, sen they ar  
halden to give presence in the Kingis parliament, and general coun-  
cel, fra thine foorth, be halden to compeir in proper person, and not  
be a procuratour; but gif the procuratour alieage there, and prove,  
a lauchfull cause of their absence.

All prelates,  
peers, and  
freeholders  
to give pre-  
sence in par-  
liament per-  
sonally:  
Not by pro-  
curator,  
without a  
lawful cause  
of absence.



JAMES I. PARL. VII. 1427. CAP. 101.

*That Small Baronnes and Freeholders needis not to come to Parliamentes.*

Small barons, &c. need not come to parliament or general councils. Commissioners of shires, to be chosen, in each two or more, according to its largeness. Clackmannan and Kinross, one each. Who are to choose a common speaker of the parliament: To have full power of hearing and determining all causes: And to have costs off their constituents, and their rents, proportionally. All prelates, peers, and ban-rents to be specially summoned.

**I T E M**, the King, with consent of the haill council, generallie hes statute and ordained, that the small baronnes and free tennentes neid not to cum to parliaments nor general councils; swa that of ilk schirefdome there be send, chosen at the head court of the schirefdome, twa or maa wise men, after the largenes of the schirefdome; out-tane the schirefdomes of Clackmannan and Kinross, of the quhilkis ane be sende of ilk ane of them, the quhilk fall be called Commissares of the Schire; and be their commissares of all the Schires fall be chosen an wise man and expert, called the Commoun Speaker of the Parliament, the quhilk fall propone all and findrie needis and causes pertaining to the commounes, in the parliament or general council; the quhilkis commissares fall have full and haill power of all the laif of the schirefdome, under the witnessing of the schireffis seale, with the seales of diverse baronnes of the schire, to heare, treat, and finallie to determine all causes to be proponed in council or parliament: The quhilkis commissares and speakers fall have costage of them of ilk schire that awe compeirance in parliament or council; and of their rents, ilk pound fall be utheris fallow to the contribution of the said costes. All Bishoppes, Abbottes, Priors, Dukes, Erlès, Lordes of Parliament, and Ban-rentes, the quhilkis the King will, be received and fummound to council and parliament be his special precept.

JAMES



JAMES II. PARL. XIV. 1457. CAP. 75.

*That na Freehalder be constreinzie to the Parliament, bot he be of Twenty Pounds woorth of Land.*

ITEM, the Lordes thinkis speedeful, that na freehalder that haldis of the King, under the summe of twentie pounds, be constreinzie to cum to the parliament, or general councel, as for presence, bot gif he be ane baronne, or els be specially, of the Kingis commandement, warned, outhir be officiar or be writ.

No freeholder, under 20 pounds, constrained to come to parliament or general councils, unless he be a baron, or specially warned.

JAMES IV. PARL. VI. 1503. CAP. 78.

*That all Freeholders, within ane Hundreth Markes of Extent, send their Procuratoures to the Parliament.*

ITEM, it is statute and ordained, that fra thinefoorth, na baronne, freehalder, nor vassal, quhilk ar within ane hundreth markes of this extent, that now is, be compelled to cum personally to the parliamente, bot gif it be that our Sovereine Lorde write specially for them; and sa not to be unlawed for their presence, and they send their procuratours to answer for them, with the baronnes of the schire, or the maist famous persons: And all that ar abone the extent of ane hundreth markes to cum to the parliament, under the paine of the auld unlaw.

No baron, &c. within a hundred merks of new extent, obliged to attend parliament personally; (except the King write specially for them), Nor be unlawed if they send their procurator for them. All above this extent to attend under a fine.

JAMES



## JAMES VI. PARL. XI. 1587, CAP. 114.

*The Commissioners of small Baronnes and Freeholders hes Vote in Parliament.*

Preamble.  
Act James  
VI. 1585,  
recited.

Precepts to  
be directed  
for choos-  
ing com-  
mission-  
ers.

Qualifica-  
tions of com-  
missioners.

Of those ha-  
ving right to  
elect.

O U R Sovereine Lorde, considering the acte of his Hienesse parliament, halden at Linlithcow the tenth day of December, the zeir of God ane thousand five hundreth fourscore five zeires \*, makand mention how necessar it is to his Hienesse, and his estaite, to bee trewly informed of the needes and causes pertaining to his loving subiectes in all estaite, specially the commounes of the realme, and remembring of ane gude and lovable acte made be his Hienesse progenitour King James the First, of worthy memory, in the parliament halden at Perth the first day of March, the zeir of God ane thousand four hundreth twenty-seven zeirs, anent the commissioners of small barronnes in parliament, that his Majesty, and his said estaite, would ratifie and appreeve the same to have full effect, and to be put to execution in time cumming; and of new statute and ordaine, for the mair full explanation of the same act, and certaine execution thereof, that precepts suld be directed foorth of the chancellary, to ane barron of ilk schire first, to conveene the freeholders within the same schire, for choosing of the commissioners, as is contained in the same acte: Quhilkis commissioners being anis chosen and send to parliament, the precepts of parliament for conveening of freeholders, to the effect foresaid, to be directed to the last commissioners of ilk schire, quhilkis fall cause cheise twa wise men, being the Kingis freeholders, resident indwellers of the schire, of gude rent, and weill esteemed, as commissioners of the same schire, to have power and to be authorized, as the act proports, under the commissioners seale, in place of the schireffes; and that all freeholders of the King, under the degree of prelates and lords of parliament,

\* The act here referred to is No. V. of this Appendix, page 418.



ment, be warned be proclamation, to be present at the choosung of the saids commissioners, and nane to have voit in their election bot sik as hes fourtie shilling land in free-tennendry halden of the King, and hes their actual dwelling and residence within the same schire; quhilk matter being remitted be the said estaites, conveened in the said parliament at Linlithcow, to the will and good consideration of our said Sovereine Lord, to do and ordaine therein as his Hienesse sould think maist expedient and requisite betuixt and his nixt parliament: And now his Majesty intending, God willing, to take ordour for the finall settling and establishing of that gude forme and ordour maist meete and expedient to stand in perpetuity in this behalfe, according to the effect of the said act of parliament maid at Linlithcow, in consideration of the great decay of the ecclesiastical estait, and uthers maist necessar and weighty considerations moving his Hienesse: Therefore his Majesty, now after his lawfull and perfite age of xxi. zeirs compleit, sittand in plane parliament, declaris and decernis the said act, maid be King James the First, to take full effect and execution, and ratifies and apprievis the same be thir presents: And for the better execution thereof, ordainis the commissioners of all the schireffdoms of this realme, according to the number prescribed in the said act of parliament, to be elected be the freeholders foresaids, at the first head court after Michael-mes zeirly, or failzeing thereof, at ony uther time quhen the saids freeholders please conveene to that effect, or that his Majesty fall require them thereto; quhilks conventions his Majesty declaris and decernis to be lauchfull: And the saids commissioners being chossen, as said is, for ilk schireffdome, their names to be notified zeirly in writte to the director of the chancellary be the commissioners of the zeir preceeding; and thereafter, quhen ony parliament, or generall convention is to be halden, that the said commissioners be warned at the first be vertew of precepts furth of the chancellary, or be his Hienesse missive letters or charges, and in all times thereafter be precepts

Act 101.  
Ja. I. ratified.

Commissioners of shires, in number as prescribed by that act, to be annually elected at the first head court after Michaelmas, &c.

Their names to be notified to the director of the chancery by the preceeding commissioners. Manner of warning them to parliament.



The freeholders to be taxed for their expenses, and may be charged with horning for payment.

Their commissions to be sealed and subscribed by six, at least, of the barons and freeholders.

To be equal in number with those of the boroughs, upon the articles, &c.

Missives to be directed to them before general councils, as to the boroughs.

Lords of Session to direct letters yearly, for electing commissioners, and taxing their expenses.

Their compearance shall relieve the remanent small barons, &c. of their suits in parliament. Protest.

cepts of the chancellery, as fall be directed to the uther estaites; and that all freeholders be taxt for the expenses of the commissioners of the schires passing to parliament or generall councelles, and letters of poynding or horning to be direct for payment of the summes taxt to that effect, upon ane simple charge of sex dayes warning allanerly; and that the said commissioners authorized with sufficient commissiones of the schireffdomes fra quhilk they cum, sealed and subscribed with sex at the least of the barrones and freeholders thereof, fall be equal in number with the commissioners of burrowes on the articles, and have vote in parliament and generall councelles in time cumming, and that his Majesties missives before generall councelles fall be directed to the saids commissioners, or certaine of the maist ewest of them, as to the commissioners of burrowes in time cumming; and that the Lords of Councell and Session fall zeirly direct letters, at the instance of the saids commissioners, for conveening of freeholders to choose the commissioners for the nixt zeir, and making of taxation, to the effect abonewritten; and that the compeirance of the saids commissioners of the schires in parliaments or generall councelles fall relieve the haill remanent small barrones and freeholders of the schires of their suites and presence aucht in the saids parliaments, providing alwayes that the small barrones observe there promises and conditions maid to his Majesty. Upon the quhilk declaration and ordinance, maid and pronounced be our Soveraine Lord sittand in plaine parliament, as said is, John Murray of Tullibardin asked actes and instruments, and David Earle of Crawford, Lord Lindsay, for himselfe, and in name and behalfe of uthers of the nobility, protesting in the contrair.

JAMES



## JAMES VI. PARL. XV. 1597, CAP. 276.

*Barronnes suld send to the Parliament Commissioners with sufficient Commissiones.*

OUR Sovereine Lord and estates of parliament statutis and ordainis, That na barronnes be received as commissioners for ony schireffedome within this realme, at ony parliament to be halden hereafter, except the saids barronnes bring and produce with them sufficient commissions, granted to them in an full convention of the haill barronnes of the said schireffedome; quhilk commission sall be authorisid with the subscription of ane great number of the barons then present, togidder with the clerk of the said convention his subscription; and gif the said commission be not past in dew forme, in manner foresaid, his Hieness and estaites discharges the clerk of register, in all time hereafter, of ony receiving of their saids commissiones.

No commissioners of shires to be admitted without sufficient commissions, subscribed by a great number of the barons present, in a full meeting of the shire, and their clerk.

The clerk register forbid to receive any commissions not duly execute.

## CHARLES II. PARL. I. 1661, CAP. 35.

*Act concerning the Election and Charges of the Commissioners from Shires to the Parliament.*

THE King's Majesty considering, that diverse debates have formerly occurred, concerning the persons who ought and should have vote in the election of commissioners from the severall shires of this kingdom to parliament, and who are capable to be commissioners to parliaments, and that it is necessar for the good of his service, that the same be cleared for the future, doth therefore, with advice and consent of his estates of parliament, statute, enact, and declare, That, beside all heritors who hold a fourty shillings land of the King's

Preamble.

All heritors holding a forty shilling land of the King *in capite*, also all heritors, life-renters, and wadsetters holding of

T t t.

Majesty



the King, and others who held formerly of bishops, &c. and now of the King, having yearly 10 chalders victual, or L. 1000, (feu-duties excepted), are capable to elect, and be elected commissioners to parliament.

Commissioners of shires allowed L. 5 Scots *per diem* for their charges, chargeable upon the heritors, &c. holding of the King or Prince, in proportion to their estate within the shire; and to be levied by horning, poynding, and quartering, as the days of parliament shall be attested by the clerk register.

To be in the same manner relieved of the prices of their footmantles; which are to be made forthcoming to the shire at the rising of each parliament.

Majesty *in capite*, that also all heritors, liferenters, and wodssetters holding of the King, and others who held their lands formerly of the bishops or abbots, and now hold of the King, and whose yearly rent doth amount to ten chalders of victual, or one thousand pounds, (all feu-duties being deducted) shall be, and are capable to vote in the election of commissioners of parliaments, and to be elected commissioners to parliaments, excepting alwayes from this act all noblemen and their vassals. And it being just, that those who shall be chosen, and accordingly shall attend his Majestie's and the kingdom's service in parliaments, have allowance for their charges, his Majestie doth therefore, with advice foresaid, modifie and appoint five pounds Scots, of daily allowance, to every commissioner from any shire, including the first and last dayes of the parliament, together with eight days for their coming, and as much for their return, from the furthest shires of Caithness and Sutherland, and proportionably at nearer distances; and that the whole freeholders, heritors, and liferenters holding of the King and Prince shall, according to the proportion of their lands and rents lying within the shire, be lyable and oblidge in the payment of the said allowance, excepting noblemen and their vassals. For payment of which, all execution of horning, poynding, and quartering is to pass as for raising of the excise, and that according as the time and dayes of the parliament shall be attested under the clerk of register's hand. And because, at this time, some commissioners of shires have been put to extraordinary expences, in providing of footmantles for the riding of the parliament, it is hereby statute, that the commissioners shall be relieved of the prices thereof, to be given in under their hands; and that the prices of the footmantles be raised in the same way, and by the same execution, with the daily allowance aforesaid, the commissioners alwayes, at the rising of each parliament, making the footmantles forthcoming to the shire, to be disposed as they shall think fit.

CHARLES



## CHARLES II. PARL. III. 1681. CAP. 21.

*Act concerning the Election of Commissioners for Shires.*

OUR Sovereigne Lord considering the great delay in dispatch of publick affairs in parliament, and convention of estates, occasioned by the controverted elections of commissioners for shires: For preventing whereof, and for clearing the orderly way of election of the said commissioners in time coming; therefore, his Majesty, with advice and consent of his estates of parliament, statutes and ordains, that none shall have vote in the election of commissioners for shires, or stewartries, which have been in use to be represented in parliament and conventions, but those who, at that time, shall be publickly infeft in property or superiority, and in possession of a forty shilling land of old extent, holden of the King or Prince, distinct from the few-duties in few-lands; or, where the said old extent appears not, shall be infeft in lands lyable in publick burden, for his Majesty's supplies, for four hundred pounds of valued rent, whether kirk-lands, now holden off the King, or other lands holding few, waird, or blench, off his Majesty, as King or Prince of Scotland; and that apprisers or adjudgers shall have no vote in the saids elections during the legal reversion; and that, after the expiring thereof, the appriser or adjudger first infeft shall only have vote, and no other appriser or adjudger coming in *pari passu*, till their shares be divided, that the extent or valuation thereof may appear; and that, during the legal, the heritor having right to the reversion shall have vote; and likewise proper wodssetters, having lands of the holding, extent, or valuation foresaid; which rights to vote, proceeding upon expired comprising, adjudication, or proper wodset,

T t t 2.

shall

## Preamble.

None have right to vote at elections of commissioners, unless infeft in property or superiority, and in possession of a forty shilling land of old extent, distinct from the feu-duties; or in lands of L. 400 valued rent, whether kirk-lands or others, holden of the King or Prince. Apprisers or adjudgers have no right to vote during the legal, but only the reversion; and, after its expiration, the first infeft only. Proper wodssetters are entitled.



No objection  
of redemption,  
on payment,  
&c. compe-  
tent against  
adjudgers,  
&c. unless a  
decree of  
declarator,  
or voluntary  
redemption,  
&c. be pro-  
duced.  
Apparent  
heirs in pos-  
session are  
entitled to  
vote.  
Also liferent-  
ers and hus-  
bands, ha-  
ving right  
thro' their  
wives or by  
courtesy, if  
they claim  
their vote,  
otherwise the  
fiar only.  
No person in-  
fest for relief  
or payment  
of sums en-  
titled.  
Manner of  
making up  
the rolls of  
freeholders.

Of revising  
and altering  
them.

Roll to be  
inserted in  
the sheriff's  
books, &c.

shall not be questionable upon pretence of any order of redemption, payment and satisfaction, unless a decret of declaratour, or voluntary redemption, renunciation, or resignation, be produced; and that appeirand heirs, being in possession, by virtue of their predecessors infeftment, of the holding, extent, and valuation foresaid, and likewise liferenters, and husbands, for the freeholds of their wives, or having right to a liferent by the courtesie, if the saids liferenters claime their vote, otherwayes the fiar shall have vote; but that both fiar and liferenter shall not have vote, unless they have distinct lands, of the holding, extent, or valuation foresaid; but that no person infest for relief, or payment of sums, shall have vote, but the granters of the saids rights, their heirs or successors. Likeas, his Majesty ordains the whole freeholders of each shire and stewartry, having election of commissioners, to meet and convene at the head burghs thereof, and to make up a roll of all the freeholders within the same, whether lying within stewartries not having commissioners, or bailiaries of royalty, or regality, or without the same, upon the first Tuesday of May next to come, according as the same shall be instructed to be of the holding, extent, or valuation foresaid, containing the names and designations of the fiars, liferenters, and husbands, having right to vote for the same, in manner above written, and expressing the extent, or valuations of the saids freeholders, with power to continue or adjourn their meetings, untill the said roll for elections be fully compleat. Likeas, the saids freeholders shall meet and convene at the head burghs of the said shires and stewartries, *respectivè*, at the Michaelmas head court, yearly thereafter, and shall revise the said roll for election, and make such alterations therein as have occurred since their last meeting, from time to time; which roll for election shall be insert in the sheriff or stewart books, particularly appointed for that end, according as they shall be stated each Michaelmas court:

And



And at the election of commissioners, either at the Michaelmas court, or at the calling of parliament, or conventions, the saids freeholders shall meet and convene at the head burgh of the shire, or stewartry, in that room where the sheriff or steward court useth to be held, betwixt mid-day and two afternoon; which room shall be patent to them, and all others removed but whom they call; and the first or second commissioner last elected, or, in their absence, the sheriff or steward-clerk, shall ask the votes, Who shall preside? and, Who shall be clerk to the meeting? And in case any alteration have happened in the said roll of elections since the last meeting, the persons then coming to have right to vote shall be insert in the roll; and there shall no objection be admitted against any insert in the said roll, as said is, but what shall be propounded before they begin to vote to election: And if the objectors shall not be cleared, and acquiesce, they shall take instruments, containing their objections against the admitting to, or excluding any person from the foresaid roll. And it is hereby declared, that no other objection shall be competent in parliament or convention, but what shall be contained in the instruments taken, as aforesaid: And in case objections be made when a parliament or convention is not called, a particular diet shall be appointed by the meeting, and intimat to the parties controverting, to attend the Lords of Session for their determination, who shall determine the same at the said diet summarily, according to law, upon supplication, without farther citation. And it is hereby declared, that horning for a civil cause, or non-residence, shall be no sufficient objection; but that the minority, being instantly verified, shall be a sufficient objection, or the not taking the test appointed by the sixth act of this present parliament, which is hereby ordered to be subscribed by all the voters, in presence of the meeting, before they proceed to the election, and recorded in the sheriff court-books, and so returned, with the commission, to the clerk of register. And

if

The freeholders at elections to meet in the sheriff or steward court room 'twixt mid-day and two afternoon. Manner of proceeding in choosing preses and clerk, and inserting voters. No objections to be admitted, unless made before beginning to vote.

No objections competent in parliament, &c. other than those contained in an instrument taken at election. When the meeting is to appoint the parties a diet to attend the Lords of Session for their determination. Horning for a civil cause, or non-residence, no sufficient objection. Minority is, or not taking the test before election.



Penalties upon the objections being sustained by parliament, or not.

The sheriffs, &c. to make public intimation of the call and diet of parliament, and of the elections.

Manner thereof.

The heritors, &c. to contribute for the commissioners charges and foot-mantles, according to their valuations.

if the persons objected against shall appear at the parliament, or convention, and instruct the right to vote, the objecter shall pay their expences, and be farther fined in five hundred merks: And if the objection be sustained in parliament, the objecters appearing shall have their expences, and the party objected against shall be fined in five hundred merks. And to the effect that sufficient advertisement may be given to all parties having vote in election, who are to elect at the calling of a parliament, or convention, the sheriffs and stewarts are hereby ordained to make publication of the call and diet of the said parliament, and convention, and of the diet appointed for election, and that at the head burgh of the shire or stewartry, upon a mercat-day, betwixt ten and twelve in the forenoon; and, also, shall make the like intimation at each paroch kirk on Sunday immediately thereafter; which diets for election shall, at least, be twelve dayes before the meeting of parliament, or eight dayes before the meeting of a convention, that the commissioners elected may have sufficiency of time to keep the diet of the parliament, or convention. Likeas, his Majesty, with consent foresaid, statutes and ordains the whole heritors, liferenters, and wodsetters, within each shire and stewartry, to contribute for the charges of the commissioners thereof, according to their valuation, except only those who hold off noblemen or bishops, or lands belonging to burrows royal in burgage; and also to the expences of the foot-mantles.

QUEEN



## QUEEN ANNE, PARL. I. SESS. 4. 1707. CAP. 8.

*Act settling the manner of Electing the Sixteen Peers, and Forty-five Commons, to represent Scotland in the Parliament of Great Britain.*

OUR Sovereign Lady considering, that, by the twenty-second article of the treaty of Union, as the same is ratified by an act past in this session of parliament, upon the sixteenth of January last, it is provided, that, by virtue of the said treaty, of the peers of Scotland, at the time of the Union, sixteen shall be the number to sit and vote in the House of Lords, and forty-five the number of the representatives of Scotland, in the House of Commons of the parliament of Great Britain; and that the said sixteen peers, and forty-five members in the House of Commons, be named and chosen in such manner, as by a subsequent act in this present session of parliament in Scotland shall be settled; which act is thereby declared to be as valid as if it were a part of, and ingrossed in the said treaty: Therefore, her Majesty, with advice and consent of the estates of parliament, statutes, enacts, and ordains, that the said sixteen peers, who shall have right to sit in the House of Peers, in the parliament of Great Britain, on the part of Scotland, by virtue of this treaty, shall be named by the said peers of Scotland, whom they represent, their heirs or successors to their dignities and honours, out of their own number, and that by open election, and plurality of voices of the peers present, and of the proxies for such as shall be absent, the said proxies being peers, and producing a mandate in writing, duly signed before witnesses, and both the constituent and proxy being qualified according to law; declaring also, that such peers as are absent, being qualified as aforesaid, may send to all such meetings lists of

the

Preamble.  
Twenty-second article  
of union.

Sixteen peers  
for Scotland  
to sit in the  
parliament  
of Great Britain,  
to be named by  
the peers of  
Scotland out  
of their own  
number.  
Absents may  
vote by proxies,

or send signed lists.



In case of death or incapacity of any peer elected, another to be chosen in his place in the same manner.

Of the forty-five commoners for Scotland, thirty to be chosen by the shires, &c. and fifteen by the boroughs.

Each shire and stewartry to have one.

Exception. In case of death or incapacity of any member, another to be chosen by the shire, &c. in his place. Edinburgh to have one.

And fourteen to be chosen by the commissioners of the other boroughs, who are divided into fourteen districts.

the peers whom they judge fittest, validly signed by the said absent peers, which shall be reckoned in the same manner as if the parties had been present, and given in the said list. And, in case of the death, or legal incapacity of any of the said sixteen peers, that the foresaid peers of Scotland shall nominate another of their own number in place of the said peer, or peers, in manner before and after mentioned. And that, of the said forty-five representatives of Scotland in the House of Commons, in the parliament of Great Britain, thirty shall be chosen by the shires or stewartries, and fifteen by the royal boroughs, as follows, viz. one for every shire and stewartry, excepting the shires of Bute and Caithness, which shall choose one by turns, Bute having the first election; the shires of Nairn and Cromarty, which shall also choose by turns, Nairn having the first election; and, in like manner, the shires of Clackmannan and Kinross shall choose by turns, Clackmannan having the first election. And, in case of the death, or legal incapacity of any of the said members, from the respective shires or stewartries above mentioned, to sit in the House of Commons, it is enacted and ordained, that the shire or stewartry who elected the said member shall elect another member in his place. And that the said fifteen representatives for the royal boroughs be chosen as follows, viz. that the town of Edinburgh shall have right to elect and send one member to the parliament of Great Britain; and that each of the other burghs shall elect a commissioner, in the same manner as they are now in use to elect commissioners to the parliament of Scotland; which commissioners and burghs (Edinburgh excepted) being divided in fourteen classes or districts, shall meet at such time and place, within their respective districts, as her Majesty, her heirs, or successors, shall appoint, and elect one for each district, viz. the burghs of Kirkwall, Wick, Dornock, Dingwall, and Tayne, one; the burghs of Fortrose, Inverness, Nairn, and Forres, one; the burghs of Elgin, Cullen, Banff, Inverury, and Kintore, one; the burghs of Aberdeen, Inver-

hervie,



bervy, Montrose, Aberbrothock, and Brechin, one; the burghs of Forfar, Perth, Dundee, Cowper, and St Andrews, one; the burghs of Crail, Kilrennie, Anstruther-Easter, Anstruther-Wester, and Pittenweem, one; the burghs of Dysart, Kirkcaldie, Kinghorn, and Burntisland, one; the burghs of Inverkeithing, Dumfermling, Queensferry, Culross, and Stirling, one; the burghs of Glasgow, Renfrew, Rutherglen, and Dumbarton, one; the burghs of Haddington, Dunbar, Northberwick, Lawder, and Jedburgh, one; the burghs of Selkirk, Peebles, Linlithgow, and Lanerk, one; the burghs of Dumfries, Sanquhar, Annan, Lochmaban, and Kirkcudbright, one; the burghs of Wigtoun, Newgalloway, Stranrawer, and Whitehorn, one; and the burghs of Air, Irvine, Rothesay, Campbeltoun, and Inverary, one. And it is hereby declared and ordained, that, where the votes of the commissioners for the said burghs, met to choose representatives from their several districts to the parliament of Great Britain, shall be equal, in that case, the president of the meeting shall have a casting or decisive vote, and that by and attour his vote as a commissioner from the burgh from which he is sent; the commissioner from the eldest burgh presiding in the first meeting, and the commissioners from the other burghs, in their respective districts, presiding afterwards, by turns, in the order as the said burghs are now called in the rolls of the parliament of Scotland. And in case that any of the said fifteen commissioners from the burghs shall decease, or become legally incapable to sit in the House of Commons, then the town of Edinburgh, or the district which choosed the said member, shall elect a member in his or their place. It is always hereby expressly provided and declared, that none shall be capable to elect, or be elected, for any of the said estates, but such as are twenty-one years of age compleat, and protestant, excluding all Papists, or such, who, being suspect of Popery, and required, refuse to swear and subscribe the formula contained in the third act, made in the eighth and ninth sessions of King William's parliament, inti-

Where the votes at elections are equal, the president to have the casting vote, besides his own.

In case of death, or incapacity, another to be chosen by the town of Edinburgh, or the district. None but those of twenty-one years of age, and Protestants, and who take the Formula, if required, capable to vote, or be elected for any of the estates.

U u u

tuled,



None to be a  
commoner  
for any place  
in Scotland,  
but such as  
were capable  
to be elected  
to the parlia-  
ment of  
Scotland.

Upon calling  
a parliament  
writs shall be  
directed to  
the privy  
council of  
Scotland,

who are to  
issue a pro-  
clamation for  
electing six-  
teen peers for  
Scotland.

Manner  
thereof.

The names  
of the peers  
elected to be  
certified to  
the clerk of  
the privy  
council by  
the clerk re-  
gister, &c.

and for elec-  
ting the com-  
missioners of  
shires,  
their names  
to be certified

tuled, 'Act for preventing the growth of Popery : ' And also decla-  
ring, that none shall be capable to elect, or be elected, to represent  
a shire or burgh in the parliament of Great Britain, for this part of  
the united kingdom, except such as are now capable, by the laws of  
this kingdom, to elect, or to be elected as commissioners for shires  
or burghs to the parliament of Scotland. And, further, her Majesty,  
with advice and consent foresaid, for the effectual and orderly  
election of the persons to be chosen to sit, vote, and serve, in the re-  
spective houses of the parliament of Great Britain, when her Majesty,  
her heirs, and successors, shall declare her or their pleasure for hold-  
ing the first, or any subsequent parliament of Great Britain, and  
when, for that effect, a writ shall be issued out under the great seal  
of the united kingdom, directed to the privy council of Scotland,  
conform to the said twenty-second article, statutes, enacts, and or-  
dains, that, until the parliament of Great Britain shall make further  
provision therein, the said writ shall contain a warrant and com-  
mand to the said privy council to issue out a proclamation in her  
Majesty's name, requiring the peers of Scotland for the time, to  
meet and assemble at such time, and place, within Scotland, as her  
Majesty and royal successors shall think fit, to make election of the  
said sixteen peers; and requiring the Lord Clerk-Register, or two  
of the clerks of session, to attend all such meetings, and to admini-  
ster the oaths that are, or shall be, by law required, and to ask the  
votes; and, having made up the lists in presence of the meeting, to  
return the names of the sixteen peers chosen (certified under the  
subscription of the said Lord Clerk Register, clerk or clerks of session  
attending) to the clerk of the privy council of Scotland: And, sick-  
like, requiring and ordaining the several freeholders in the respective  
shires and stewartries, to meet and convene at the head burghs of  
their several shires and stewartries, to elect their commissioners, con-  
form to the order above set down; and ordaining the clerks of the  
said meetings, immediately after the said elections are over, respec-  
tively,



tively, to return the names of the persons elected to the clerks of the privy council. And, *lastly*, ordaining the city of Edinburgh to elect their commissioner, and the other royal boroughs to elect each of them a commissioner, as they have been in use to elect commissioners to the parliament, and to send the said respective commissioners, at such times, to such burghs, within their respective districts, as her Majesty and successors, by such proclamations, shall appoint; requiring and ordaining the common clerk of the respective burghs, where such elections shall be appointed to be made, to attend the said meetings, and, immediately after the election, to return the name of the persons so elected (certified under his hand) to the clerk of privy council; to the end, that the names of the sixteen peers, thirty commissioners for shires, and fifteen commissioners for burghs, being so returned to the privy council, may be returned to the court from whence the writ did issue under the great seal of the united kingdom, conform to the said twenty-second article. And whereas, by the said twenty-second article, it is agreed, that, if her Majesty shall, on or before the first day of May next, declare, that it is expedient, the Lords and Commons of the present parliament of England, should be the members of the respective houses of the first parliament of Great Britain, for and on the part of England, they shall accordingly be the members of the said respective houses, for and on the part of England; her Majesty, with advice and consent foresaid, in that case only, doth hereby statute and ordain, that the sixteen peers, and forty-five commissioners for shires and burghs, who shall be chosen by the peers, barons, and burghs, respectively, in this present session of parliament, and out of the members thereof, in the same manner as committees of parliament are usually now chosen, shall be the members of the respective houses of the said first parliament of Great Britain, for, and on the part of Scotland: Which nomination and election being certified by a writ under the Lord Clerk Register's hand, the persons so nominated and elected

U u u 2

shall

after election  
by the clerk  
of the meet-  
ing.

And for elec-  
ting the com-  
missioners of  
boroughs.

Manner of  
election.

The clerk of  
the presiding  
boroughs to  
certify the  
names of the  
persons elec-  
ted.

The names  
of the sixteen  
peers, and  
forty-five  
commis-  
sioners, to be re-  
turned by  
the privy  
council.

Manner of  
electing the  
peers and  
commoners  
for Scotland  
to the first  
parliament of  
Great Bri-  
tain, in case  
the present  
members for  
England be  
continued.



shall have right to sit and vote in the House of Lords, and in the House of Commons, of the said first parliament of Great Britain.

Anno Sexto ANNÆ REGINÆ, CAP. 6.

*An Act for rendering the Union of the two kingdoms more entire and complete.*

The two following paragraphs of this act relate to the elections of members of parliament for Scotland.

In what manner the forty-five representatives of Scotland shall be elected.

V. AND for the more uniform and exprefs method of electing and returning members to parliament, be it likewise further enacted, by the authority aforesaid, That when any parliament shall, at any time hereafter, be summoned or called, the forty-five representatives of Scotland in the House of Commons of the parliament of Great Britain, shall be elected and chosen by authority of the Queen's writs, under the great seal of Great Britain, directed to the several sheriffs and stewarts of the respective shires and stewartries; and the said several sheriffs and stewarts shall, on receipt of such writs, forthwith give notice of the time of election for the knights or commissioners for their respective shires or stewartries; and at such time of election, the several freeholders in the respective shires and stewartries shall meet and convene at the head burghs of their several shires and stewartries, and proceed to the election of their respective commissioners or knights for the shire or stewartry; and the clerks of the said meetings, immediately after the said elections are over, shall respectively return the names of the persons elected, to the sheriff or steward of the shire or stewartry, who shall annex it to his writ, and return it with the same into the court out of which the writ



writ issued : And as to the manner of election of the fifteen representatives of the royal boroughs, the sheriff of the shire of Edinburgh shall, on the receipt of the writ directed to him, forthwith direct his precept to the Lord Provost of Edinburgh, to cause a burghers to be elected for that city ; and, on receipt of such precept, the city of Edinburgh shall elect their member, and their common clerk shall certify his name to the sheriff of Edinburgh, who shall annex it to his writ, and return it with the same into the court from whence the writ issued : And as to the other royal boroughs, divided into fourteen classes or districts, the sheriffs or stewarts of the several shires and stewartries shall, on receipt of their several writs, forthwith direct their several precepts to every royal borough within their respective shires or stewartries, reciting therein the contents of the writ, and the date thereof, and commanding them forthwith to elect each of them a commissioner, as they used formerly to elect commissioners to the parliament of Scotland, and to order the said respective commissioners to meet at the presiding borough of their respective district, (naming the said presiding borough) upon the thirtieth day after the date of the *teste* of the writ, unless it be upon the Lord's day, commonly called Sunday, and then the next day after, and then to choose their burghers for the parliament ; and the common clerk of the then presiding borough shall, immediately after the election, return the name of the person so elected to the sheriff or steward of the shire or stewartry wherein such presiding borough is, who shall annex it to his writ, and return it with the same into the court from whence the writ issued ; and in case a vacancy shall happen in time of parliament, by the decease or legal incapacity of any member, a new member shall be elected in his room, conformable to the method herein before appointed ; and, in case such vacancy be of a representative for any one of the said fourteen classes or districts of the said royal boroughs, that borough which presided

How vacancies happening in time of parliament shall be supplied.



presided at the election of the deceased or disabled member shall be the presiding borough at such new election.

Shire or  
stewartry,  
&c. not ha-  
ving a turn  
to elect, to be  
omitted out  
of the writ,  
&c.

VI. Provided always, that, upon the issuing of writs of summons for the electing of a parliament, if any shire or stewartry wherein a royal borough is, hath not then a turn or right to elect a commissioner or knight of the shire or stewartry for that parliament, that then it shall be omitted out of the writ directed to such sheriff or steward, to cause a knight or commissioner for that shire or stewartry to be elected for that parliament.

Anno Sexto ANNÆ REGINÆ, CAP. 23.

*An Act to make further Provision for Electing and Summoning Sixteen Peers of Scotland to sit in the House of Peers in the Parliament of Great Britain; and for trying Peers for Offences committed in Scotland; and for the further regulating of Voters in Elections of Members to serve in Parliament.*

WHEREAS, by the two and twentieth article of the treaty of union, for uniting the two kingdoms of England and Scotland, ratified and confirmed by the respective parliaments of each kingdom, it was, amongst other things, provided, that, when her Majesty, her heirs or successors, should declare their pleasure for holding the first, or any subsequent parliament of Great Britain, until the parliament of Great Britain should make further provision therein, writs should issue under the great seal of the united kingdom of Great Britain, directed to the privy council of Scotland, commanding them to cause sixteen peers, who were to sit in the House of Lords, to be summoned to parliament, in such manner as by an act of the then present session of parliament of Scotland was, or should be settled; in which session



session of the parliament in Scotland an act was accordingly passed for that purpose, intituled, 'An act settling the manner of electing the sixteen peers and forty-five members to represent Scotland in the parliament of Great Britain;' which act was afterwards confirmed by the parliament of England, and declared to be as valid as if the same had been part of, and ingrossed in the said articles of union; by which act it is, amongst other things, provided and enacted, that the sixteen peers who should have a right to sit in the House of Peers in the parliament of Great Britain, on the part of Scotland, by virtue of the said treaty, should be named by the said peers of Scotland, whom they represent, their heirs or successors to their dignities and honours, out of their own number, and that by open election and plurality of voices of the peers present, and of the proxies for such as should be absent, the said proxies being peers, and producing a mandate in writing, duly signed before witnesses, and both the constituent and proxy being qualified, according to law; and that such peers as were absent, being qualified as aforesaid, might send to all such meetings a list of the peers whom they judged fittest, validly signed by the said absent peers, which should be reckoned in the same manner as if the parties had been present, and given in the said list; and in case of the death or legal incapacity of any of the said sixteen peers, that the aforesaid peers of Scotland should nominate another of their own number in place of the said peer or peers, in manner as therein is mentioned: And it was thereby further enacted, that, until the parliament of Great Britain should make further provision therein, the said writs so to be issued should contain a warrant and command, to command the said privy council to issue out a proclamation in her Majesty's name, requiring the peers of Scotland, for the time, to meet and assemble at such time and place within Scotland as her Majesty and her royal successors should think fit, to make election of the said sixteen peers, and requiring the Lord Clerk-register, or two of the clerks of session, to attend all such



6 Annæ,  
cap. 6.

Proclama-  
tion to be  
issued for e-  
lecting six-  
teen peers of  
Scotland to  
sit in the  
parliament of  
Great Bri-  
tain,

such meetings, and to administer the oaths as were or should be by law required, and to ask the votes ; and, having made up the list in presence of the meeting, to return the names of the sixteen peers chosen, certified under the subscription of the said Lord Clerk-regi-ster, clerk or clerks of session attending, to the clerk of the privy coun-til of Scotland, to the end that the names of the sixteen peers, being so returned to the privy council, might be returned to the court from whence the writ did issue, under the great seal of the united king-dom, conform to the said twenty-second article : And whereas, by an act of this present session, intituled, ‘ An act for rendering the union of the two kingdoms more intire and complete,’ it is de-clared and enacted, that from and after the first day of May one thousand seven hundred and eight, the privy council of Scotland shall cease and determine, whereby it is become necessary that some further provision should be made for the electing and returning the said sixteen peers, that are to sit in the House of Peers, in the par-liament of Great Britain, pursuant to the said treaty : Be it there-fore enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in parliament assembled, and by the authority of the same, that, at all times hereafter, when her Majesty, her heirs and succeffors, shall declare her or their pleasure for summoning and holding any parliament of Great Britain, that, in order to the elec-ting and summoning the sixteen peers of Scotland, a proclamation shall be issued under the great seal of Great Britain, commanding all the peers of Scotland to assemble and meet at Edinburgh, or in such other place in Scotland, and at such time as shall be appointed in the said proclamation, to elect, by open election, the sixteen peers to sit and vote in the House of Peers in the parliament of Great Britain, in such manner as by the before recited act, and herein after is ap-pointed.

And



II. And be it further enacted by the authority aforesaid, that every proclamation issued for the purpose aforesaid, shall be duly published at the market cross at Edinburgh, and in all the county-towns of Scotland, five and twenty days at the least before the time thereby appointed for the meeting of the peers to proceed to such election.

and published at Edinburgh 25 days before election.

III. And be it further enacted by the authority aforesaid, that all the peers who meet on such proclamation, shall, before they proceed to the election, and in the presence of the peers assembled for such election, take the respective oaths, *videlicet*,

All the peers present to take the oaths.

“ I A. B. do sincerely promise and swear, that I will be faithful, and bear true allegiance to her Majesty Queen Anne. So help me God.”

Oaths.

“ I A. B. do swear, that I do, from my heart, abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that Princes excommunicated or deprived by the Pope, or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign Prince, person, prelate, state, or potentate, hath, or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. So help me God.”

And shall also make, repeat, and subscribe the declaration following, *videlicet*,

And subscribe the declaration.

“ I A. B. do solemnly and sincerely, in the presence of God, profess, testify, and declare, that I do believe, that, in the sacrament of the Lord's Supper, there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at, or after the consecration thereof, by any person whatsoever ; and that

X x x

the



the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the Church of Rome, are superstitious and idolatrous. And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English Protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me, for this purpose, by the Pope, or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am, or can be acquitted before God or man, or absolved of this declaration, or any part thereof, although the Pope, or any other person or persons, or power whatsoever, should dispense with, or annul the same, or declare that it was null and void from the beginning."

And also take and subscribe the oath following, *videlicet*,

And also  
take the fol-  
lowing oath.

" I A. B. do truly and sincerely acknowledge, profess, testify, and declare in my conscience, before God and the world, that our Sovereign Lady Queen Anne is lawful and rightful Queen of this realm, and of all other her Majesty's dominions and countries thereunto belonging : And I do solemnly and sincerely declare, that I do believe in my conscience, the person pretended to be Prince of Wales, during the life of the late King James, and since his decease, pretending to be, and taking upon himself the stile and title of King of England, by the name of James the Third, or of Scotland, by the name of James the Eighth, or the stile and title of King of Great Britain, hath not any right or title whatsoever to the crown of this realm, or any other the dominions thereunto belonging : And I do renounce, refuse, and abjure any allegiance or obedience to him. And I do swear, that I will bear faith and true allegiance to her Majesty



Majesty Queen Anne, and her will defend, to the utmost of my power, against all traiterous conspiracies and attempts whatsoever which shall be made against her person, crown, or dignity. And I will do my best endeavour to disclose and make known to her Majesty, and her successors, all treasons and traiterous conspiracies which I shall know to be against her, or any of them. And I do faithfully promise, to the utmost of my power, to support, maintain, and defend the succession of the crown against him the said James, and all other persons whatsoever, as the same is, and stands settled by an act, intituled, 'An act declaring the rights and liberties of the subject, and settling the succession of the crown to her present Majesty, and the heirs of her body, being Protestants;' and as the same, by one other act, intituled, 'An act for the further limitation of the crown, and better securing the rights and liberties of the subject,' is and stands settled and entailed, after the decease of her Majesty, and for default of issue of her Majesty, to the Princess Sophia, Electress and Dutches-Dowager of Hanover, and the heirs of her body, being Protestants. And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever: And I do make this recognition, acknowledgment, abjuration, renunciation, and promise heartily, willingly, and truly, upon the true faith of a Christian. So help me God."

1. W. & M.  
sess. 2. cap.  
2.

12. and 13.  
W. III. cap.  
2.

IV. And that such peers that live in Scotland, but shall not be present at such meeting so appointed, may take the said oaths, and make and subscribe the said declaration, in any sheriff's court in Scotland, and every sheriff, or his deputy, before whom such oaths, and such declaration, shall be so made, subscribed and repeated, shall, and is hereby required to return the original subscription of such oath and

How peers  
living in  
Scotland, or  
residing in  
England,  
not present  
at election,  
may take  
the oaths,  
&c.

X x x 2.

declaration,



After elec-  
tion, the  
Lord clerk  
register to  
certify the  
names of the  
sixteen peers  
And be  
thereby qua-  
lified to make  
a proxy, &c.

declaration, signed by the peer who took the same, and make a return in writing, under his hand and seal, to the peers so assembled, of such peers taking the said oaths, and making and subscribing the said oath and declaration, and such peer shall be thereby enabled and qualified to make a proxy, or to send a signed list, containing the names of the sixteen peers of Scotland for whom he giveth his vote; and such of the peers of Scotland as, at the time of issuing such proclamation, reside in England, may take and subscribe the said oaths, and make, repeat, and subscribe the said declaration, in her Majesty's High Court of Chancery in England, her Majesty's Court of Queen's Bench, Common Pleas, or Court of Exchequer in England, which being certified by writ, to the peers in Scotland at their meeting, under the seal of the court where such oath and declaration shall be made, repeated, and subscribed, shall be sufficient to entitle such peer to make his proxy, and to send a signed list, as aforesaid; and in case any of the said peers of Scotland, who, at any time before the issuing of such proclamation, have taken the said oaths, and made and subscribed the said declaration in England or Scotland, to be certified as aforesaid, and, if taken in parliament, to be certified under the great seal of Great Britain, shall, at the time of issuing such proclamation, be absent in the service of her Majesty, her heirs or successors, such peer may make his proxy, or send a signed list.

How proxies  
shall be sign-  
ed, &c.

V. Provided always, and be it enacted by the authority aforesaid, that such peers of Scotland as are also peers of England, shall sign their proxies and lists by the title of their peerage in Scotland.

No peer to  
have more  
than two  
proxies.

VI. And be it further enacted by the authority aforesaid, that no peer shall be capable of having more than two proxies at one time.

VII.



VII. And be it further enacted by the authority aforesaid, that, at such meeting of the peers, they shall all give in the names of the persons by them nominated to sit and vote in the House of Peers, in the parliament of Great Britain, and the Lord Clerk Register, or two of the principal clerks of the session, appointed by him to officiate in his name, shall, after the election is made, and duly examined, certify the names of the sixteen peers so elected, and sign and attest the same in the presence of the peers; which certificate, so signed and attested, shall, by the Lord Clerk Register, or two of the principal clerks of the sessions, be returned into her Majesty's high court of Chancery of Great Britain, before the time appointed for the meeting of the parliament.

After election, the Lord clerk-register to certify the names of the sixteen peers elected.

VIII. And be it further enacted by the authority aforesaid, that the peers shall come to such meetings with their ordinary attendants only, according to, and under the several penalties inflicted by the several laws and statutes now in force in Scotland, which prescribe and direct with what numbers and attendants the subjects there may repair to the publick courts of justice.

How peers shall come attended to elections,

IX. And be it further enacted by the authority aforesaid, that it shall not be lawful for the peers so assembled, and met together for the electing sixteen peers to sit and vote in the House of Peers, in the parliament of Great Britain, to act, propose, debate, or treat, of any other matter or thing whatsoever, except only the election of the said sixteen peers; and that every peer who shall, at such meeting, presume to propose, debate, or treat, of any other matter or thing, contrary to the direction of this act, shall incur the penalty of pre-munire expressed in the statute of the sixteenth year of King Richard the second.

and not debate or treat of any matter, &c. except only the election.

X.



All matters  
concerning  
the election  
to be obser-  
ved.

5. Annae,  
cap. 8.

Exception.

In case of  
death, or dis-  
ability of  
peer elected,  
proclamati-  
on to issue for  
electing an-  
other.

X. And be it further enacted by the authority aforesaid, that all and every matter and things for, or concerning the election of sixteen peers of Scotland, to sit and vote in the House of Peers, in the parliament of Great Britain, directed and appointed to be observed and done by the articles of Union, and the said recited act of parliament in Scotland, intituled, 'Act settling the manner of electing the sixteen peers, and forty-five members, to represent Scotland in the parliament of Great Britain,' which act, by an act of parliament in England, in the fifth year of her Majesty's reign, intituled, 'An act for an Union of the two kingdoms of England and Scotland,' was declared to be as valid as if the same had been part of, and ingrossed in the articles of Union, thereby ratified and approved, shall be observed and performed, except only wherein this act has further declared and provided.

XI. And be it further enacted by the authority aforesaid, that, in case any of the sixteen peers so chosen shall die, or become otherwise legally disabled to sit in the House of Peers of the parliament of Great Britain, that her Majesty, her heirs and successors, shall forthwith, after such death or disability, issue a proclamation under the great seal of Great Britain, for electing another peer of Scotland to sit in the House of Peers of the parliament of Great Britain, in the room of such peer deceased, or otherwise legally disabled; which proclamation shall be published at such time and places as is herein enacted, touching proclamations issued upon summoning a parliament of Great Britain; and the peers of Scotland, being qualified as is hereby directed, shall proceed to elect a peer of Scotland to sit in the House of Peers, of the parliament of Great Britain, in room of such peer deceased, or otherwise legally disabled, in such manner, and under such restrictions and regulations, as are by this act directed to be observed upon the electing sixteen peers of Scotland to sit in the House of Peers of the parliament of Great Britain.

XII.



How peers  
shall be tried  
for treason,  
murder, &c.  
committed in  
Scotland.

XII. And be it further enacted by the authority aforesaid, that, for the more effectual trial of any peer of Great Britain that hath committed, or shall commit, any high-treason, petit-treason, misprision of treason, murder, or other felonies in Scotland, commission or commissions may issue under the great seal of Great Britain, to be directed to such person and persons as shall be therein named, constituting them, and such a number of them as shall be therein mentioned, justices of the Queen, her heirs and successors, to inquire by the oaths of good and lawful men, of such county and counties of Scotland as shall be named therein, of all treasons, misprisions of treason, murders, and other felonies, committed in such county by a peer, or peers, of Great Britain, which inquisition shall be taken and made in the same manner as indictments found and taken before justices of oyer and terminer of any county of England, and shall be of the same effect, and proceeded upon in the same method as any inquisition found before justices of oyer and terminer in England, whereby any peer is indicted for any such offence; and such justices shall issue mandates or precepts to the sheriffs of the respective counties of Scotland, to return to them at such day and place as they shall appoint, such and so many good and lawful men of the same county as may be sufficient to inquire of the offences aforesaid, and twelve, or more of them, so returned, being sworn, shall be sufficient to make such inquiry, and find any indictment; and, if the sheriff of such county shall not summon a sufficient number of men to make such inquisition, the justices that do proceed upon such commission may impose a fine upon such sheriff, which shall be levied by process out of the exchequer; and if any of the persons summoned by the sheriff to inquire, as aforesaid, shall not appear, the justices may, in like manner, impose a fine upon such person so making default, to be levied in manner aforesaid.

XIII.



Persons refusing to take oaths, &c. incapable of voting for election of member.

XIII. And be it further enacted by the authority aforesaid, that every person who shall refuse to take the oath last herein before recited, or, being a quaker, shall refuse to declare the effect thereof upon his solemn affirmation, as directed by an act of parliament made in the seventh year of the reign of his late Majesty, King William, intituled, 'An act that the solemn affirmation and declaration of the people called Quakers, shall be accepted instead of an oath in usual form,' (which oath or declaration the sheriff, president of the meeting, or chief officer taking the poll at any election of members to serve in the House of Commons for any place in Great Britain, or commissioners for choosing burgeses for any place in Scotland, at the request of any candidate, or other person present at such election, are hereby impowered and required to administer) shall not be capable of giving any vote for the election of any such member to serve in the House of Commons for any place in Great Britain, or commissioner to choose a burges for any place in Scotland.

Quakers, declaring on affirmation, not liable to penalties by 6. Annae, cap. 14. 7. & 8. W. III. cap. 34.

XIV. Provided always, and be it enacted by the authority aforesaid, that if any person, being a Quaker, shall refuse to take the said oath, being tendered to him in pursuance of an act made this present session of parliament, intituled, 'An act for the better security of her Majesty's person and government,' but shall, instead thereof, declare the effect of the said oath, upon his solemn affirmation, as directed by an act of parliament made in the seventh year of the reign of his late Majesty, King William the Third, intituled, 'An act that the solemn affirmation and declaration of the people called Quakers, shall be accepted instead of an oath in usual form;' which affirmation shall be administered to such Quaker instead of the said oath; such Quaker shall not be liable to any the penalties and forfeitures for refusing the said oath, when tendered to him, contained or mentioned in the said act, intituled, 'An act for the better security of her Majesty's person and government.'

6. Annae, cap. 14.

Anno



Anno Duodecimo A N N Æ REGINÆ. CAP. 6.

*An Act for the better Regulating the Elections of Members to serve in Parliament for that part of Great Britain called Scotland.*

WHEREAS, of late, several conveyances of estates have been made in trust, or redeemable for elusory sums, no ways adequate to the true value of the lands, on purpose to create and multiply votes in elections of members to serve in parliament for that part of Great Britain called Scotland, contrary to the true intent and meaning of the laws in that behalf: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that, from and after the determination of this present parliament, no conveyance, or right whatsoever, whereupon infeoffment is not taken, and seifine registered, one year before the *teste* of the writs for calling a new parliament, shall, upon objection made in that behalf, entitle the person, or persons, so infeft, to vote, or to be elected, at that election, in any shire or stewartry in that part of Great Britain called Scotland; and in case any election happen during the continuance of a parliament, no conveyance or right whatsoever, whereupon infeoffment is not taken one year before the date of the warrant for making out a new writ for such election, shall, upon objection made in that behalf, entitle the person, or persons, so infeft, to vote, or be elected, at that election; and that, from and after the said day, it shall, or may, be lawful to, or for any of the electors present, suspecting any person, or persons, to have his or their estates in trust, and for the behoof of another, to require the preses of the meeting to tender the following oath to any elector; and the said preses is hereby im-

Y y y.

powered

After the end of this parliament, no conveyance whereon infeffment is not taken, or seifine registered a year before the *teste* of the writ, shall entitle to vote or be elected in Scotland: Nor if any election happen during the continuance of a parliament. Any elector may require the preses to tender an oath to one whom he suspects to have an estate in trust.



powered and required to administer the same in the words following, viz.

The oath.

"I A. B. do, in the presence of God, declare and swear, that the lands and estate of \_\_\_\_\_ for which I claim to give my vote in this election, are not conveyed to me in trust, or for the behoof of any other person whatsoever; and I do swear before God, that neither I, nor any person to my knowledge, in my name, or by my allowance, hath given, or intends to give, any promise, obligation, bond, backbond, or other security, for redispensing or reconveying the said lands and estate, any manner of way whatsoever. And this is the truth, as I shall answer to God."

Refusing,  
shall not  
vote.

And in case such elector refuse to swear, and also to subscribe the said oath, such person or persons shall not be capable of voting, or being elected, at such election.

Other objections as allowable by law.

II. Provided always, that, notwithstanding such oath taken, it shall be lawful to make such other objections as are allowed by the laws of Scotland against such electors.

No infeffment on any redeemable right, except proper wadsets, &c. shall entitle to vote or be elected. And persons not enrolled at former elections, shall not vote without producing a right.

III. And be it further enacted and declared by the authority aforesaid, that no infeffment taken upon any redeemable right whatsoever, except proper wadsets, adjudications, or apprisings, allowed by the act of parliament relating to elections in one thousand six hundred eighty-one, shall entitle the person so infeffed to vote, or be elected, at any election in any shire or stewartry; and that no person, or persons, who have not been enrolled, and voted at former elections, shall, upon any pretence whatsoever, be enrolled, or admitted to vote at any election, except he or they first produce a sufficient right or title to qualify him or them to vote at that election, to the satisfaction of the freeholders formerly enrolled, or the majority



majority of them present; and the returning officers are hereby ordained to make their returns of the persons elected by the majority of the freeholders enrolled, and those admitted by them, reserving always the liberty of objecting against the persons admitted to, or excluded from the roll, as formerly.

IV. And be it further enacted by the authority aforesaid, that all sheriffs of shires, and stewarts of stewartries, shall be obliged, under the pain of fifty pounds Sterling, one moiety whereof shall be to the Queen's most excellent Majesty, her heirs, and successors, and the other moiety to the person or persons who shall sue for the same, to be recovered before the court of session, by any action summarily, without abiding the course of the roll, to make the publick intimations required by the laws of Scotland, at the several parish churches within their respective jurisdictions, at least three days before the diet of elections.

Sheriffs, &c. shall, on penalty of L. 50, make public intimation three days before the day of election.

V. Provided always, that the right of apparent heirs in voting at elections by virtue of their predecessors infeoffments, and the right of husbands by virtue of their wives infeoffments, be, and is hereby reserved to them as formerly; any thing in this act contained to the contrary notwithstanding.

Saving the rights of heirs and husbands.

VI. Provided also, that any conveyance or right, which, by the laws of Scotland, is sufficient to qualify any person to vote in the elections of members to serve in parliament for shires or stewartries, and whereupon infeoffment is taken on or before the first day of June, in the year of our Lord one thousand seven hundred and thirteen, shall entitle the person, or persons, so infeft, to vote at the elections of members to serve in the next ensuing parliament, any thing herein contained to the contrary notwithstanding.

Any right qualifying to vote in elections for shires, &c. shall entitle to vote for members of parliament.



Husbands  
not to vote  
by virtue of  
their wives  
infeoffment,  
unless they  
are heiresses.

VII. Provided always, and it is hereby declared to be the true intent and meaning of this act, that no husbands shall vote at any ensuing election by virtue of their wives infeoffments, who are not heiresses, or have not right to the property of the lands on account whereof such vote shall be claimed.

Anno Primo GEORGII REGIS. CAP. 13.

*An Act for the further Security of his Majesty's Person and Government, and the Succession of the Crown in the Heirs of the late Princess Sophia, being Protestants; and for extinguishing the Hopes of the Pretended Prince of Wales, and his open and secret Abettors.*

[The following clause of this act relates to elections.]

IV. AND whereas certain doubts and scruples have arisen concerning the sense and meaning of the clause following, contained in an act made in the sixth year of her late Majesty Queen Anne, intituled, 'An act to make further provision for electing and sum-  
' moning sixteen peers of Scotland to sit in the House of Peers in  
' the parliament of Great Britain; and for trying peers for offences  
' committed in Scotland; and for the further regulating of voters  
' in elections of members to serve in parliament;' whereby it is enacted, that every person who shall refuse to take the oath last therein before recited, or, being a Quaker, shall refuse to declare the effect thereof upon his solemn affirmation, as directed by an act of parliament made in the seventh year of the reign of his late Majesty King William, intituled, 'An act, that the solemn affirmation and  
' declaration of the people called Quakers, shall be accepted instead  
' of an oath in the usual form,' (which oath or declaration the sheriff, president of the meeting, or chief officer taking the poll at any election  
of



of members to serve in the House of Commons for any place in Great Britain, or commissioners for choosing burgesſes for any place in Scotland, at the request of any candidate, or other person present at such election, are hereby impowered and required to administer;) shall not be capable of giving any vote for the election of any such member to serve in the House of Commons for any place in Great Britain, or commissioners to choose a burgesſ for any place in Scotland: On account of which words, some have pretended to vote in the meetings of free elections in Scotland, at the choosing of the president and clerk of the meeting, without taking the oath mentioned in the last recited act, whereby it has happened that rolls of electors have been unduly made up, and wrong returns made: And also, whereas divers of his Majesty's good subjects, who have given good convincing marks of their loyalty to his royal person and government, have scrupled to take the said oath, apprehending that the reference in the said oath may be construed, in some respect, to be inconsistent with the establishment of the church in Scotland according to law, and to a clause concerning oaths to be imposed in Scotland after the union, contained in an act made in the parliament of Scotland, in the year one thousand seven hundred and seven, intituled, ' An act  
' for securing the Protestant religion, and Presbyterian church go-  
' vernment;' which act is declared to be a fundamental and essential condition of the treaty of union: To the end, therefore, that the said scruples, and all mistakes and divisions on account of the same may cease, be it further enacted and declared by the authority aforesaid, that every person who shall refuse to take the aforesaid oath of abjuration, or, being a Quaker, shall refuse to declare the effect thereof upon his solemn affirmation, in manner aforesaid, (which oath and declaration the member last elected for any county or stewartry in Scotland, or, in his absence, the sheriff or steward's clerk, until a person be chosen to preside in the said meeting, according to the directions contained in the twenty-first act of the third  
parliament



parliament of King Charles the Second, held in Scotland, intituled, 'Act concerning the election of commissioners for shires;' and, after such choice, the person so chosen to preside, or any person chosen to preside in any meeting of any county or stewartry, there in which rolls for elections shall happen to be made up, is hereby authorised and required to administer, at the request of any candidate or other person present at such meeting for election, before or after the choosing of the president of the meeting, or making up of the rolls;) shall not be capable of giving any vote for the election of a president of the meeting, making up of the rolls, or of any member to serve in the House of Commons for any place in Scotland, or commissioner to choose a burghs for any place there: And further, that, by no words in the said oath or oaths, formerly imposed, contained, it is or was meant to oblige his Majesty's said subjects to any act or acts any ways inconsistent with the establishment of the Church of Scotland according to law.

Anno Secundo GEORGII II. REGIS. CAP. 24.

*An Act for the more effectual preventing Bribery and Corruption in the Elections of Members to serve in Parliament.*

WHEREAS it is found by experience, that the laws already in being have not been sufficient to prevent corrupt and illegal practices in the election of members to serve in parliament; for remedy, therefore, of so great an evil, and to the end that all elections of members to parliament may hereafter be freely and indifferently made, without charge or expence, be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled,



assembled, and by the authority of the same, that, from and after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and twenty-nine, upon every election of any member or members to serve for the Commons in parliament, every freeholder, citizen, freeman, burgess, or person having, or claiming to have a right to vote or be polled at such an election, shall, before he is admitted to poll at the same election, take the following oath, (or, being one of the people called Quakers, shall make the solemn affirmation appointed for Quakers), in case the same shall be demanded by either of the candidates, or any two of the electors; that is to say,

Electors of parliament-men to take the following oath, if demanded.

“ I A. B. do swear, (or, being one of the people called Quakers, I A. B. do solemnly affirm) I have not received, or had by myself, or any person whatsoever in trust for me, or for my use and benefit, directly or indirectly, any sum or sums of money, office, place, or employment, gift, or reward, or any promise or security for any money, office, employment, or gift, in order to give my vote at this election, and that I have not before been polled at this election.”

Electors oath.

Which oath or affirmation the officer or officers presiding, or taking the poll at such election, is, and are hereby impowered and required to administer, gratis, if demanded, as aforesaid, upon pain to forfeit the sum of fifty pounds, of lawful money of Great Britain, to any person that shall sue for the same, to be recovered, together with full costs of suit, by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, wherein no essoign, protection, wager of law, or more than one imparlance, shall be admitted or allowed; and if the said offence shall be committed in that part of Great Britain called Scotland, then to be recovered, together with full costs of suit, by summary action, or complaint before the Court of Session, or by prosecution before

Presiding officer to administer it, on forfeiture of L. 50.



before the Court of Justiciary there, for every neglect or refusal so to do; and no person shall be admitted to poll, till he has taken and repeated the said oath in a public manner, in case the same shall be demanded, as aforesaid, before the returning officer, or such others as shall be legally deputed by him.

Sheriff or other returning officer admitting any to be polled, before sworn, to forfeit L. 100.

Voters to incur the like penalty.

Returning officer, after reading the writ, to take the following oath.

II. And be it further enacted, that if any sheriff, mayor, bailiff, or other returning officer, shall admit any person to be polled, without taking such oath or affirmation, if demanded, as aforesaid, such returning officer shall forfeit the sum of one hundred pounds, to be recovered in manner aforesaid, together with full costs of suit; and that if any person shall vote or poll at such election, without having first taken the oath, or, if a Quaker, having made his affirmation, as aforesaid, if demanded, such person shall incur the same penalty which the officer is subject to for the offence above mentioned.

III. And be it further enacted, by the authority aforesaid, that every sheriff, mayor, bailiff, head-borough, or other person, being the returning officer of any member to serve in parliament, shall, immediately after the reading the writ or precept for the election of such member, take and subscribe the following oath, *videlicet*,

“ I A. B. do solemnly swear, that I have not, directly nor indirectly, received any sum or sums of money, office, place, or employment, gratuity, or reward, or any bond, bill, or note, or any promise or gratuity whatsoever, either by myself, or any other person to my use, or benefit, or advantage, for making any return at the present election of members to serve in parliament; and that I will return such person or persons as shall, to the best of my judgment, appear to me to have the majority of legal votes.”

Which



Which oath any justice or justices of the peace of the said county, city, corporation, or borough where such election shall be made, or, in his or their absence, any three of the electors are hereby required and authorised to administer; and such oath, so taken, shall be entered among the records of the sessions of such county, city, corporation, and borough, as aforesaid.

IV. And be it enacted by the authority aforesaid, that such votes shall be deemed to be legal, which have been so declared by the last determination in the House of Commons; which last determination concerning any county, shire, city, borough, cinque port, or place, shall be final to all intents and purposes whatsoever, any usage to the contrary notwithstanding.

What votes shall be deemed legal.

V. And be it further enacted by the authority aforesaid, that if any returning officer, elector, or person taking the oath or affirmation herein before mentioned, shall be guilty of wilful and corrupt perjury, or of false affirming, and be thereof convicted by due course of law, shall incur and suffer the pains and penalties which by law are enacted or inflicted in cases of wilful and corrupt perjury.

Penalty of wilful perjury.

VI. And be it further enacted by the authority aforesaid, that no person convicted of wilful and corrupt perjury, or subornation of perjury, shall, after such conviction, be capable of voting in any election of any member or members to serve in parliament.

Persons convicted never capable to vote.

VII. And be it further enacted by the authority aforesaid, that, if any person who hath, or claimeth to have, or hereafter shall have, or claim to have any right to vote in any such election, shall, from and after the said twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and twenty-nine, ask, receive, or take any money, or other reward, by way of gift, loan,

Persons taking money or reward for their vote, &c. forfeit L. 500, and disabled to vote in any election.



or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any such election; or if any person by himself, or any person employed by him, doth or shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes, or to forbear to give his or their vote or votes in any such election, such person, so offending in any of the cases aforesaid, shall, for every such offence, forfeit the sum of five hundred pounds, of lawful money of Great Britain, to be recovered as before directed, together with full costs of suit; and every person offending in any of the cases aforesaid, from and after judgment obtained against him in any such action of debt, bill, plaint, or information, or summary action or prosecution, or being any otherwise lawfully convicted thereof, shall for ever be disabled to vote in any election of any member or members to parliament, and also shall for ever be disabled to hold, exercise, or enjoy any office or franchise to which he and they then shall, or at any time afterwards may be intitled, as a member of any city, borough, town corporate, or cinque port, as if such person was naturally dead.

Offenders in twelve months after the election discovering others, indemnified.

VIII. And be it further enacted by the authority aforesaid, that if any person offending against this act shall, within the space of twelve months next after such election, as aforesaid, discover any other person or persons offending against this act, so that such person or persons so discovered be thereupon convicted, such person so discovering, and not having been before that time convicted of any offence against this act, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any offence against this act.

IX.



IX. And for the more effectual observance of this act, be it enacted, that all and every the sheriffs, mayors, bailiffs, and other officers to whom the execution of any writ or precept for electing any member or members to serve in parliament shall belong or appertain, shall, and are hereby required at the time of such election, immediately after the reading such writ or precept, read, or cause to be read, openly before the electors there assembled, this present act, and every clause therein contained; and the same shall also openly be read once in every year at the general quarter sessions of the peace, to be holden next after Easter, for any county or city, and at every election of the chief magistrate in any borough, town corporate, or cinque port, and at the annual election of magistrates and town counsellors for every borough within that part of Great Britain called Scotland.

The act to be read by the sheriff, &c. after reading the writ,

and at the quarter sessions after Easter.

X. And be it further enacted by the authority aforesaid, that every sheriff, under sheriff, mayor, bailiff, and other officer to whom the execution of any writ or precept for the electing of members to serve in parliament doth belong, for every wilful offence, contrary to this act, shall forfeit the sum of fifty pounds, to be recovered, together with full costs of suit, in the manner before directed.

Wilful offence forfeits L. 50.

XI. Provided always, and it is hereby declared and enacted by the authority aforesaid, that no person shall be made liable to any incapacity, disability, forfeiture, or penalty by this act laid or imposed, unless prosecution be commenced within two years after such incapacity, disability, forfeiture, or penalty shall be incurred, or, in case of a prosecution, the same be carried on without wilful delay; any thing herein contained to the contrary notwithstanding.

Prosecution to commence within two years.



Anno Septimo GEORGII II. REGIS. CAP. 16.

*An Act for the better regulating the Election of Members to serve in the House of Commons, for that part of Great Britain called Scotland, and for incapacitating the Judges of the Court of Session, Court of Justiciary, and Barons of the Court of Exchequer in Scotland, to be elected, or to sit or vote as Members of the House of Commons.*

WHEREAS doubts may arise, whether the acts of parliament made in England, for preventing false and undue returns of members to serve in parliament, extend to that part of Great Britain called Scotland; and whereas several questions have arisen concerning the election of commoners to serve in parliament for that part of Great Britain; therefore, to obviate such doubts, disputes, and questions, for the future, and for the more effectually preventing returning officers in that part of Great Britain, called Scotland, making false and undue returns; May it please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that if the clerk of any meeting of freeholders for the election of a commissioner to serve in parliament for any shire or stewartry in Scotland, after the first day of May, one thousand seven hundred and thirty-four, shall wilfully return to the sheriff or steward any person, other than him who shall be duly elected, or if any other person pretending to be clerk, though not duly elected, shall presume to act as clerk, and wilfully to return to the sheriff any person as elected, who shall not be duly elected by the major part of such meeting, the party so offending shall, for every such offence, forfeit the sum of five hundred pounds Sterling,

to

After 1st  
May 1734,  
L. 500 pe-  
nalty on eve-  
ry false re-  
turn.



to be recovered by the candidate so elected, to whose prejudice such false return is made, in such manner as is herein after directed.

II. And be it further enacted, that every freeholder who shall claim to vote at any election of a member to serve in parliament, for any lands or estate in any county or stewartry in Scotland, or who shall have right to vote in adjusting the rolls of freeholders, instead of the oath appointed to be taken by an act made in the twelfth year of her late Majesty Queen Anne, intituled, 'An act for the better regulating elections of members to serve in parliament for that part of Great Britain called Scotland,' shall, upon the request of any freeholder formerly enrolled, before he proceed to vote in the choice of a member, or on adjusting the rolls, take and subscribe, upon a roll of parchment, to be provided and kept by the sheriff, or steward-clerk, for that purpose, the oath following, which the preses or clerk to the meeting, either for the enrolment or election, is hereby empowered and required to administer; that is to say,

Freeholders,  
on request,  
to subscribe  
the following  
oath, instead  
of that ap-  
pointed by  
the act 12.  
Annae.

"I A. B. do, in the presence of God, declare and swear, that the lands and estate of \_\_\_\_\_ for which I claim a right to vote in the election of a member to serve in parliament for this county or stewartry, is actually in my possession, and do really and truly belong to me, and is my own proper estate, and is not conveyed to me in trust, or for or in behalf of any other person whatsoever; and that neither I, nor any person to my knowledge, in my name, or on my account, or by my allowance, hath given, or intends to give, any promise, obligation, bond, back-bond, or other security whatsoever, other than appears from the tenor and contents of the title upon which I now claim a right to vote, directly or indirectly, for redispensing or reconveying the said lands and estate in any manner of way whatsoever, or for making the rents or profits thereof forthcoming to the use or benefit of the person from whom I have



have acquired the said estate, or any other person whatsoever; and that my title to the said lands and estate is not nominal or fictitious, created or reserved in me, in order to enable me to vote for a member to serve in parliament, but that the same is a true and real estate in me, for my own use and benefit, and for the use of no other person whatsoever; and that is the truth, as I shall answer to God."

In case of refusal, vote not to be admitted, and name erased out of the roll. Penalty on false swearing or subscribing.

III. And that, in case he shall refuse, if required, to take and subscribe the oath aforesaid, his vote shall not be admitted or allowed, and his name shall forthwith be erased out of the roll of freeholders; and in case any person shall presume wilfully and falsely to swear and subscribe the said oath, and shall be thereof lawfully convicted, he shall incur the pains and punishment of perjury, and be prosecuted for the same according to the laws and forms in use in Scotland.

Judges of session, justiciary, or exchequer, incapable to be elected.

IV. And be it further enacted, that no judge of the court of session, or justiciary, or baron of the court of exchequer in Scotland, shall be capable of being elected, or of sitting or voting as a member of the House of Commons in any parliament which shall be hereafter summoned and holden.

Sheriffs, four days after receipt of the writs, to issue precepts for choosing delegates;

and chief magistrate, two days after, to summon the council of the borough;

V. And be it further enacted by the authority aforesaid, that the several sheriffs and stewarts in Scotland shall, within the space of four days after the writ shall come to their hand, issue their precepts to the several boroughs within their jurisdiction to elect their delegates, and shall cause the same to be delivered to the chief magistrate of such borough, resident in the borough for the time being; and that such chief magistrate, to whom such precept shall be delivered, shall, within two days after his receipt of the same, call and summon the council of the borough together, by giving notice personally, or leaving notice at the dwelling-place of every counsellor then resident in such borough, which council shall then appoint a peremptory day

for



for the election of the delegate; but two free days shall intervene betwixt the meeting of the council which appoints the day of election of the delegate, and the day on which the election of the delegate is to be made.

which council shall appoint a day for electing delegates.

VI. And to prevent double elections of magistrates in boroughs, which frequently occasion double commissions to delegates, be it enacted by the authority aforesaid, that, at the annual election of magistrates and counsellors for boroughs, no magistrate or counsellor, or any number of magistrates or counsellors, shall, for the future, upon any pretence whatsoever, take upon him or them to separate from the majority of the magistrates and counsellors, who have been such for the year preceding, and to appoint or elect separate magistrates or counsellors, but shall submit to the election made, and to the magistrates and counsellors elected and appointed by the majority of the town-council assembled; and if, contrary to the direction of this act, any number of magistrates or counsellors shall, in opposition to the majority, take upon them to make a distinct and separate election of magistrates or counsellors, their act and election shall be *ipso facto* void, and every magistrate or counsellor who concurred therein shall forfeit and lose the sum of one hundred pounds Sterling, to be recovered by the magistrates and counsellors from whom they separated, in manner herein after directed.

L. 100 penalty on every counsellor or magistrate separating from the majority at the annual election for boroughs.

VII. Provided always, and it is hereby declared and enacted, that it shall and may be lawful to, and for, any magistrate or counsellor of the borough, who apprehends any wrong was done at any annual election, to bring his action before the court of session in Scotland, for rectifying such abuse, or for making void the whole election (if illegal) only within the space of eight weeks after such election is over; and the Lords of Session shall, and they are hereby expressly authorized

Magistrates or counsellors of boroughs may bring their action in 8 weeks after the election.



authorised and required to hear and determine the cause summarily, and to allow to the party that shall prevail their full costs of suit.

L. 500 penalty on neglecting to return the person duly elected.

To be recovered in a summary way.

Complaints of undue returns to be commenced in six months after return.

Who may sue for such penalty,

and in what time.

VIII. And be it further enacted, that every sheriff or steward in Scotland, who shall wilfully annex to the writ any false or undue return, and every common clerk of any presiding borough, who shall wilfully return to the sheriff or steward any person other than the person elected, or who shall neglect or refuse to return the person duly elected, shall forfeit the sum of five hundred pounds Sterling to the person intitled to have been returned, and not returned, to be recovered from the said sheriff, steward, or common clerk, their heirs, executors, or administrators, respectively, in a summary way, by action, petition, or summary complaint, before the said court of session, upon service of such summons, or of a copy of such petition, or summary complaint, on fifteen days notice or warning, without abiding the course of any rolls, or further delay whatsoever; which action, petition, or complaint, the judges of the said court are hereby required to judge of, and determine with all convenient speed: Provided always, that such action, petition, or complaint, be commenced, presented, or made within the space of six months after the return is made. And in case the person duly elected, and not returned, shall neglect or omit to sue for the said penalty within the time before mentioned, then any freeholder within the shire or stewartry, or any magistrate, or person bearing office, in any of the boroughs of the district for which the return is unduly made, may sue for and recover the same to his own use, by such action, petition, or complaint, and in such manner as is before mentioned, with double costs of suit; provided always, that such freeholder, magistrate, or person bearing office, shall commence or bring such action within the space of twelve months after the return is made.

And



IX. And be it enacted by the authority aforesaid, that every penalty by this act imposed, with respect to the recovery of which no particular provision is herein before made, shall and may be sued for, and recovered, by way of summary complaint before the court of session in Scotland, upon fifteen days notice to the person complained of, without abiding the course of any roll; which said complaint the court of session is hereby authorised and required to determine with all convenient speed.

Penalties  
how to be re-  
covered.

X. And be it further enacted, that every freeholder in Scotland shall, before he be either enrolled, or admitted to vote at any future election, or meeting for enrolment, in any question for the choice of a clerk or preses, or other question whatsoever, (if required by any freeholder present), be obliged to take and subscribe the oaths appointed by law to be taken by electors of members to serve in parliament, when required so to do; which oath the preses or clerk of the meeting is hereby empowered and required to administer.

Freeholders,  
if required,  
to take the  
oaths at the  
election of a  
clerk, &c.

XI. And whereas there have been some mistakes in the district of the boroughs of Wigtoun, Whitehorn, New Galloway, and Stranrawer, in relation to their presiding at elections of members of parliament for that district, which may occasion disputes at future elections, for remedying thereof, be it enacted, that the boroughs continue to preside in the course they are now in, and that the borough of Wigtoun shall preside at the election of a member to represent that district in the next parliament, and that the other boroughs of the district preside afterwards in the method prescribed by the act of parliament of Scotland, made in the fourth session of the first parliament of Queen Anne, intituled, 'An act for settling the manner of electing the sixteen peers and forty-five commoners, to represent Scotland in the parliament of Great Britain.'

Method of  
presiding at  
elections.



Anno decimo sexto GEORGII II. REGIS. CAP. II.

*An Act to explain and amend the Laws touching the Elections of Members to serve for the Commons in Parliament, for that part of Great Britain called Scotland, and to restrain the Partiality, and regulate the Conduct, of Returning Officers at such Elections.*

WHEREAS many returning officers of members to serve for the commons in parliament, for that part of Great Britain called Scotland, have of late presumed to act in a most partial and arbitrary manner, sometimes upon false pretences, that the rolls of electors of commissioners for shires were not regularly made up, or that the commissioners for the several boroughs intitled to vote in the choice of a member for the respective districts of boroughs were not duly elected, or were not authorised by proper commissions, and sometimes, without any pretence at all, encouraged thereto from hopes of impunity, by reason that the laws in being have either provided no sufficient punishment for such offences, or, where penalties are provided, it has been found by experience to be extremely difficult, and scarcely possible to recover them; for remedy thereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that so much of an act of parliament made in the twelfth year of the reign of her late Majesty Queen Anne, intituled, 'An act for the better regulating the elections of members to serve in parliament for that part of Great Britain called Scotland,' as enacts, That no person or persons, who have not been enrolled, and voted at former elections, shall, upon any pretence whatsoever, be enrolled, or admitted to vote at any election, except he or they first produce a sufficient right or title to qualify him or them to vote at that election,

Part of the  
act 12. Annæ,  
stat. 1. cap.  
6. § 3. re-  
pealed.



election, to the satisfaction of the freeholders formerly enrolled, or the majority of them present, and ordains the returning officers to make their returns of the persons elected, by the majority of the freeholders enrolled, and those admitted by them, reserving always the liberty of objecting against the persons admitted to, or excluded from the roll as formerly, shall be, and is hereby repealed.

II. And whereas the rolls of electors of commissioners to serve in parliament for the several shires and stewartries within that part of Great Britain called Scotland, have not, in every one of the said shires and stewartries, been made up every year, at the Michaelmas head courts, pursuant to the directions of an act of parliament made in that part of Great Britain called Scotland, in the year one thousand six hundred and eighty-one, intituled, 'An act concerning the election of commissioners for shires;' for remedy thereof, and the more effectually to carry the good intentions of the said act into execution, be it enacted and declared, by the authority aforesaid, that such persons as stand upon the roll last made up by the freeholders, whether at the Michaelmas meeting, or at the last election of a member to serve in parliament, shall be the original constituent members at their next Michaelmas meeting, or meeting for election, to revise the said roll.

Act made in  
Scotland in  
1681,  
strengthen-  
ed.

III. Provided always, and be it enacted by the authority aforesaid, that it shall and may be lawful for any freeholder standing upon the roll, to object to the title of any person who stands at present upon the roll last made up, and for that purpose to apply at any time before the first day of December, which shall be in the year of our Lord one thousand seven hundred and forty-three, by summary complaint to the court of session, who shall grant a warrant for summoning such persons, upon thirty days notice, to answer, and shall proceed, in a summary way, to hear and determine upon such complaint;

Freeholders  
may object.



plaint; and if no such complaint shall be exhibited within the time aforefaid, then, and in that case, no freeholder, who at present stands upon the rolls last made up in the said counties and stewartries respectively, shall be struck off, or left out of the roll, except upon sufficient objections arising from the alteration of that right or title, in respect of which he was enrolled, sustained by the other freeholders standing upon the said roll.

Manner of  
acting, when  
a person  
claims to be  
enrolled.

IV. And be it enacted by the authority aforefaid, that if, at any Michaelmas meeting, or meeting for election, any person claiming to be enrolled shall, by judgment of the freeholders, be refused to be admitted, or if any person who stood upon the roll shall, by like judgment, be struck off, or left out of the roll, it shall and may be lawful for him, or them, who is so refused to be admitted, or whose name is so struck off, or left out of the roll, to apply (so as such application be made within four kalendar months after their being so refused, struck off, or left out) by summary complaint to the court of session, who shall grant a warrant for summoning the person or persons upon whose objection or objections he was refused to be admitted, or was struck off, or left out, as aforefaid, upon thirty days notice, to answer, and shall proceed to hear and determine, in a summary way, on such complaint; and if any person shall be enrolled whose title shall be thought liable to objection, it shall and may be lawful for any freeholder standing upon the said roll, (whether such freeholder was present at the meeting or not), who apprehends that such person had not a right to be enrolled, to apply in like manner by complaint to the court of session, so as such application be made within four kalendar months after such enrolment; and the said court, after service of such complaint, on thirty days notice, upon the person said to be wrongfully admitted to the roll, shall, in manner aforefaid, hear and determine; and if no such complaint shall be exhibited within the time aforefaid, the freeholder enrolled shall stand

If any freeholder objects, appeal may be made to the Court of Session.



stand and continue upon the roll until an alteration of his circumstances be allowed by the freeholders at a subsequent Michaelmas meeting, or meeting for election, as a sufficient cause for striking or leaving him out of the roll.

V. And be it enacted by the authority aforesaid, that if, in any of the aforesaid cases, the judgment of the court of session shall alter or reverse the determination of the meeting of the freeholders, by directing that any person shall be added to, or expunged from the roll of election, the sheriff or steward's clerk shall, upon presenting to him the extract of such judgment, forthwith make the alteration thereby directed in the books that are kept by him; and in case of his refusal or delay, he shall forfeit the sum of one hundred pounds Sterling to the person in whose favour the judgment of the court of session is given, to be recovered by him or his executors in the manner herein after directed.

Penalty on officers not obeying the Court of Session.

VI. And be it further enacted by the authority aforesaid, that if the judgment of the freeholders, refusing to admit, or striking off any person from the said roll, shall be affirmed by the court of session, the person so complaining shall forfeit to the objector the sum of thirty pounds Sterling, with full costs of suit.

Penalty on appellant, if the Court of Session affirm the freeholders order.

VII. And be it enacted by the authority aforesaid, that, to prevent all surprise at the Michaelmas meetings, every freeholder who intends to claim to be enrolled at any subsequent Michaelmas meeting of the freeholders, shall, for the space of two kalendar months at least before the said Michaelmas meeting, leave with the sheriff or steward's clerk a copy of his claim, setting forth the names of his lands, and his titles thereto, and dates thereof, with the old extent or valuation, upon which he desires to be enrolled; and in case of his neglect to leave his claim as aforesaid, he shall not be enrolled

Manner of acting to prevent surprise, on freeholders claiming to be enrolled;

at



or on making  
objections to  
others al-  
ready enrol-  
led.

at such Michaelmas meeting; and in like manner, whoever intends to object to any freeholder who stands upon the roll, on account of the alteration of his circumstances, shall, at least two kalendar months before the Michaelmas meeting, leave his objections in writing with the sheriff or steward's clerk, as aforesaid, who is hereby required, upon receipt of the aforesaid claim or objections, to indorse on the back thereof the day he received the same, and also to give a copy of the aforesaid claim or objections to any person who shall demand the same, upon paying the legal fee of an ordinary extract of the same length.

Division of  
the old ex-  
tent of lands  
to multiply  
electors pro-  
hibited.

VIII. And whereas great difficulties have occurred in making up the rolls of electors of commissioners for shires, by persons claiming to be enrolled, in respect of the old extent of their lands, where the old extent does not appear from proper evidence, and votes have been unduly multiplied, by splitting and dividing the old extent of lands, since the sixteenth day of September one thousand six hundred and eighty-one; for remedy thereof, be it enacted and declared, by the authority aforesaid, that no person is, or shall be, entitled to vote for a commissioner to serve in parliament, for any shire or stewartry in that part of Great Britain called Scotland, or to be enrolled in the roll of electors, in respect of the old extent of his lands, holden of the King or Prince, unless such old extent is proved by a retour of the lands, of a date prior to the sixteenth day of September one thousand six hundred and eighty-one, and that no division of the old extent, made since the aforesaid sixteenth day of September one thousand six hundred and eighty-one, or to be made in time coming, by retour, or any other way, is or shall be sustained as sufficient evidence of the old extent.

Proviso.

IX. Provided always, that lands holden of the King or Prince, liable in public burdens for four hundred pounds Scots of valued rent,



rent, shall in all cases be a sufficient qualification, whatever be the old extent of the said lands; any law or practice to the contrary notwithstanding.

X. And be it further enacted by the authority aforesaid, that no purchaser or singular successor shall be enrolled till he be publickly infeoff, and his seisin registered, or charter of confirmation be expedite, where confirmation is necessary, one year before the enrolment; and that no heir apparent shall be enrolled until his predecessors titles are produced, and allowed by the freeholders as a sufficient qualification for his voting for a member of parliament; and that any person may be enrolled, though absent at the time of such enrolment, provided the titles and vouchers of his qualification are produced, and laid before the freeholders; and if any person shall be chosen a member to serve in parliament for any shire or stewartry within that part of Great Britain called Scotland, who shall not be present at the meeting of election; be it enacted by the authority aforesaid, that the member to serve in parliament so elected, before he takes his seat in parliament, shall take the oath appointed to be taken by every freeholder who shall claim to vote at any election of a member to serve in parliament, by the act of the seventh year of his present Majesty, intituled, 'An act for the better regulating the election of members to serve in the House of Commons, for that part of Great Britain called Scotland; and for incapacitating the judges of the Court of Session, Court of Justiciary, and Barons of the Court of Exchequer in Scotland, to be elected, or to sit or vote as members of the House of Commons, before the Lord Steward of his Majesty's household, or any person or persons authorised by him for that effect, which he or they are hereby impowered and required to administer; and if a member to serve in parliament, so elected, shall neglect

How a purchaser shall act before he is enrolled;

also an heir apparent.

Persons may send their vouchers, and be enrolled, though absent.

Every one chosen in his absence to serve in parliament, shall take the freeholder's oath before he takes his seat.

On refusing the oath, the election declared void.



neglect or refuse to take the aforesaid oath, such election shall be void.

Who are to be original constituent members.

Minutes of proceedings to be entered in books kept by the sheriff or steward's clerk.

Minute-books to be produced at public meetings.

Penalty on refusal.

XI. And be it further enacted by the authority aforesaid, that, at the annual meetings of the freeholders at Michaelmas, the original constituent members shall be such persons only as shall stand upon the roll that shall have been last made up, whether at a Michaelmas meeting, or at a meeting for an election of a member to serve in parliament, and that a copy signed and extracted of the roll, made up by the freeholders at their Michaelmas meetings, or meetings for elections, together with the minutes of their proceedings at their said meetings, shall, by the respective clerks of such meetings, be forthwith delivered to the sheriff or steward's clerk *gratis*, and shall be inserted in books, to be kept by the said sheriff or steward's clerk for that purpose, who shall forthwith deliver copies of the same, extracted and signed, to any freeholder who shall desire the same, paying the legal fee for any ordinary extract of the same length, and shall, at every subsequent meeting at Michaelmas, or meeting for any election, produce the said books for the use of the freeholders; and in case such sheriff or steward's clerk shall neglect or refuse to enter the aforesaid rolls of election, or minutes of proceedings, into books so to be kept for that purpose, as aforesaid, or shall neglect or refuse to give copies thereof, extracted and signed, or shall omit to produce the books at any subsequent meeting, as aforesaid, he shall for every such offence forfeit the sum of one hundred pounds Sterling, to be recovered by any freeholder, within such shire or stewartry, who shall sue for the same, in such manner as is hereafter directed; and if the aforesaid principal books, containing the rolls and minutes as aforesaid, shall not be produced at the Michaelmas meetings, or meetings for election, a copy of the said roll and minutes, extracted and signed by the sheriff or steward's clerk, shall be sufficient; and if the sheriff or steward's clerk shall give out



out false copies of the said roll or minutes, extracted and signed by him, he shall for every such offence forfeit the sum of one hundred pounds Sterling to the person to whom the false copy is given, to be recovered by him or his executors in the manner herein after directed, and shall be for ever after incapable of holding or enjoying his said office.

Penalty on giving out false copies of the minutes.

XII. And be it further enacted by the authority aforesaid, that, at every election of a commissioner to serve in parliament for any shire or stewartry within that part of Great Britain called Scotland, the roll of electors which shall be last made up by the freeholders, whether at the Michaelmas meeting, or at the last election of a member to serve in parliament, shall be the roll to be called over by the commissioner last elected, or, in his absence, by the sheriff or steward's clerk, in order to the election of preses and clerk, as also by the preses, after he is chosen, for the choice of the member to serve in parliament, and for the determination of all the questions that shall arise in the adjusting the roll, and in the course of the election, excepting so far as the said roll shall, after the meeting is duly constituted by the choice of preses and clerk, be altered by judgment of the majority of the freeholders standing on that roll, by leaving out those whose circumstances are altered, and by adding others who produce proper titles.

The roll of electors last made up shall be used at the next election.

XIII. And be it further enacted by the authority aforesaid, that, at every meeting for an election of a commissioner to serve in parliament, if the commissioner last elected, or, in his absence, the sheriff or steward's clerk, shall, in the choice of preses or clerk, receive the vote of any person that does not stand upon the said roll, he shall, for every such offence, forfeit the sum of three hundred pounds Sterling to every candidate for the office of preses or clerk respectively, for whom such person shall not have given his vote, to be

Penalty for taking false votes.



Penalty on  
refusing  
good votes.

On equality  
of votes, in  
choosing a  
preses or  
clerk, who  
shall have  
the casting  
vote.

recovered by him or them, his or their executors respectively, in manner herein after directed; or, if the commissioner last elected, or, in his absence, the sheriff or steward's clerk, shall, in the choice of preses or clerk, not call for, or shall refuse the vote of any person whose name is upon the said roll, he shall, for every such offence, forfeit the like sum of three hundred pounds Sterling to the person whose name shall not be called for, or whose vote shall be refused, to be recovered by him, or his executors, in the manner herein after directed; and if the preses, after he is chosen, shall, in the election of the member to serve in parliament, receive the vote of any person who does not stand upon the roll duly made up by the said meeting, he shall, for every such offence, forfeit the sum of two hundred pounds Sterling to every candidate for whom such person shall not have given his vote, to be recovered by him, or his executors, in the manner herein after directed; or, if the preses, after he is chosen, shall, in the election of the member to serve in parliament, not call for, or shall refuse the vote of any person whose name is upon the said roll so made up as aforesaid, he shall, for every such offence, forfeit the like sum of two hundred pounds Sterling to the person whose name shall not be called for, or whose vote shall be refused, to be recovered by him or his executors in the manner herein after directed: And it is hereby declared, that, in case of equality of votes in the choice of preses or clerk, the commissioner last elected, and, in his absence, any freeholder present who last represented the shire or stewartry in any former parliament; and if no such person is present, the freeholder present who presided last at any meeting for any election, and, in his absence, the freeholder who last presided at any Michaelmas meeting; and if none of the said persons shall be present, the freeholder present who stands first on the roll, shall, besides their own votes as freeholders, have the casting and determining vote, and that the preses chosen shall, after his election in the choice of the commissioner to serve in parliament,



parliament, and all other questions where the votes are equal, in like manner, besides his own vote as a freeholder, have the casting and determining vote.

XIV. And be it further enacted by the authority aforesaid, that the persons chosen to be preses and clerk by the majority of the freeholders present, standing on the said roll, shall be preses and clerk of the meeting for such election; and it shall not be lawful for any number of freeholders to separate from the majority of the persons present who stand upon the said roll, and set up any person as preses or clerk other than those who shall be chosen by the majority of the freeholders present standing on the said roll, and that it shall not be lawful for any person to act as preses or clerk at any such election, unless they are chosen by the majority of persons standing on the said roll; and every freeholder who shall so separate from the majority of the freeholders on the roll, and set up any person as preses or clerk, other than those who shall be chosen by the majority as aforesaid, he shall for every such offence forfeit the sum of fifty pounds Sterling, to the candidate who shall be chosen by the majority of the freeholders from whom such separation was made; to be recovered by him or his executors in the manner herein after directed: And if any person presume to act as preses or clerk who is not chosen by the majority of the freeholders present standing on the said roll, he shall, for every such offence, forfeit the sum of two hundred pounds Sterling to the candidate who shall be chosen by the majority of the freeholders, as aforesaid, to be recovered by him or his executors, as herein after directed.

The preses and clerk being chosen by the majority of freeholders, no separated party shall choose another.

Penalty on separating from the freeholders.

Penalty on acting as preses or clerk without any authority.

XV. And be it further enacted by the authority aforesaid, that the commissioner last elected, or, in his absence, the sheriff or steward's clerk, shall sign the minutes of the election of preses and clerk, and deliver the same to the clerk chosen by the majority of the free-

Minutes of election of preses and clerk to be signed and delivered to the clerk chosen.



Penalty on  
refusing to  
sign, or on  
signing false  
minutes.

holders, as aforesaid; and if the commissioner last elected, or, in his absence, the sheriff or steward's clerk, shall neglect or refuse to sign the aforesaid minutes of election of preses and clerk, and deliver the same to the clerk chosen, as aforesaid, or shall sign false minutes thereof, he shall, for every such offence, forfeit the sum of one hundred pounds Sterling to the person elected preses, as aforesaid, to be recovered by him or his executors, in the manner hereafter directed.

Clerk to  
make a true  
return.

Penalty on  
refusing, or  
making a  
false one.

XVI. And be it further enacted by the authority aforesaid, that the clerk chosen by the majority of the freeholders on the aforesaid roll, shall return to the sheriff or steward such person as shall be elected by the majority of the freeholders on the roll made up at the meeting for election, in the manner aforesaid; and if the clerk chosen as aforesaid shall refuse or neglect to return the person elected by the majority of the freeholders on the roll made up at the meeting for election, or shall return any person other than him who shall be elected by the majority of the freeholders, as aforesaid, he shall, for every such offence, instead of the penalty or forfeiture to which he is made liable by the aforesaid act, made in the seventh year of his present Majesty, forfeit the sum of five hundred pounds Sterling to the candidate chosen by the majority of the freeholders on the aforesaid roll, to be recovered by him, or his executors, in the manner herein after directed.

XVII. And be it further enacted by the authority aforesaid, that every sheriff or steward of any shire or stewartry, within that part of Great Britain called Scotland, upon producing to him a copy of the aforesaid roll last made up by the freeholders at the last Michaelmas meeting, or at the last election of a member to serve in parliament, extracted and signed by the sheriff or steward's clerk, and upon producing and shewing to him the original minutes of the election of preses and clerk,



clerk, signed by the commissioner last elected, or, in his absence, by the sheriff or steward's clerk, shall annex to the writ the return made by the clerk chosen by the majority of the freeholders on the aforesaid roll; and if any such sheriff or steward shall neglect or refuse to annex to the writ such return, or if he shall annex to the writ the return made by any other person pretending to be clerk to the election, he shall for every such offence, instead of the penalty or forfeiture to which he is made liable by the aforesaid act, made in the seventh year of his present Majesty, forfeit the sum of five hundred pounds Sterling to the person returned by the clerk, and chosen by the majority of the freeholders on the aforesaid roll, to be recovered by him, or his executors, in the manner hereafter directed.

The return  
to be annex-  
ed to the  
writ.

Penalty for  
every of-  
fence.

XVIII. And be it further enacted by the authority aforesaid, that every sheriff or steward of any shire or stewartry, within that part of Great Britain called Scotland, shall hold the Michaelmas head court, in all time to come, on the day on which it shall appear to him to have been most usually held in times past; and to prevent all uncertainty in time coming, every sheriff or steward shall, at least fourteen days before Michaelmas next, appoint a precise day for holding his Michaelmas head court, in the year one thousand seven hundred and forty-three, and shall cause intimate the day of holding his court at all the parish churches within his said shire or stewartry, upon a Sunday, at least eight days preceding the next Michaelmas head court: And it is hereby declared, that the day so to be appointed by the said sheriff or steward before Michaelmas next, shall be the anniversary for holding the Michaelmas head court of the said shire or stewartry in all time coming.

When the  
Michaelmas  
head court  
shall be held.

To be inti-  
mated in all  
parish  
churches  
eight days  
before.

XIX. And whereas, by the constitution of the shire of Sutherland, and by constant usage, the small barons of the said shire have been represented in parliament, not only by the immediate vassals of  
the

Usage of  
the shire of  
Sutherland.



Qualification  
of candidates  
and electors.

the King and Prince, but also by those who held their lands of the Earls of Sutherland, or of other subject superiors, and such vassals holding their lands of subject superiors, have been in use to vote at the election of the commissioners for the said shire of Sutherland, as well as the vassals of the King and Prince, and that without any restriction as to the *quota* of the old extent, or of the valued rent of the lands, in respect whereof a right to vote at such elections, or to be elected commissioner for the said shire was claimed, and thereby votes have been unduly multiplied, and several persons have claimed a vote in respect of the superiority and property of the same lands, whereby great confusions are likely to ensue in future elections; for remedy thereof, be it further enacted by the authority aforesaid, that from and after the first day of September, which shall be in the year of our Lord one thousand seven hundred and forty-five, no person shall be capable to be elected commissioner for the said shire, or shall have right to vote at such election, unless he be infeoff, and in possession of lands liable to his Majesty's supplies, and other publick burthens, at the rate of two hundred pounds Scots valued rent.

Candidates  
and electors  
to hold their  
lands im-  
mediately from  
the King or  
Prince.

XX. And be it further enacted by the authority aforesaid, that one person, and no more, shall be entitled to vote at such elections, or to be elected, in respect of the same lands; and that where lands are now holden by any baron, or other freeholder, immediately of the King or Prince, such baron or freeholder shall be capable to be elected, and shall be entitled to vote for those lands; and no vassal or sub-vassal of the said baron or freeholder shall have right to vote, or to be elected, in respect thereof; and that where lands are now holden, or shall at any time hereafter be holden, of the King or Prince, by a peer, or other person, or body politic or corporate, who by law are disabled to be a member of the House of Commons,



or to vote in such elections; in such case, the proprietor and owner of such lands, and not any of his superiors, shall be entitled to vote, or to be elected, in respect of the same lands; and that no alienation of the superiority to be made by such peer, or other person, or body politic, incapable to elect, or to be elected, shall deprive the proprietor and owner of the lands of his right to vote in the elections for the said shire, or his capacity to be elected; nor intitle the purchaser of the said superiority to vote or to be elected; and that the property of lands of the valuation aforesaid, holden, in part, immediately of the King or Prince, and in part of a peer, or other person, or body politic, incapable to elect, or to be elected, shall be a sufficient qualification to the proprietor and owner of such lands, and shall entitle such proprietor to vote, and to be elected for the said shire, any law or usage to the contrary notwithstanding.

In what cases  
the proprie-  
tors only  
shall vote.

Lands held  
part of the  
King, and  
part of a  
peer, &c.  
shall qualify  
the owner to  
elect or be e-  
lected.

XXI. And be it enacted by the authority aforesaid, that the freeholders and proprietors, having right to elect, or to be elected, a commissioner for the shire of Sutherland, shall meet at the head borough of the said shire, at the Michaelmas head court, which shall be in the year of our Lord one thousand seven hundred and forty-five, and shall make up a roll of the electors having right to vote in the choice of a commissioner, in the terms of this present act, and of the other acts of parliament made touching the election of commissioners for the shires in Scotland; and which roll, so made up, shall be revised yearly at the Michaelmas meetings, and at after elections, according to the rules prescribed in this act, and in other acts made for regulating the elections of commissioners for shires in that part of Great Britain called Scotland: And it is hereby declared, that the said acts of parliament do extend to the shire of Sutherland, as well as to the other shires in Scotland, except in so far as it is otherwise provided by this present act.

When free-  
holders in  
Sutherland  
shall meet  
and make a  
roll.

XXII.



At annual  
elections, the  
minority shall  
not separate  
from the  
majority.

Penalty on  
offenders.

No person e-  
lected by the  
minority  
shall have a  
right to act.

Penalty on  
acting when  
so chosen.

XXII. And whereas at the election of members to serve in par-  
liament for the districts of boroughs in that part of Great Britain  
called Scotland, it often happens that more persons than one claim  
to be admitted to vote as commissioners for the same borough, which  
furnishes pretences to the clerks of the presiding boroughs for par-  
tially making false and undue returns; for remedy thereof, be it  
enacted by the authority aforesaid, that, at the annual election of  
magistrates and counsellors, and in all the proceedings previous to the  
election of the magistrates and counsellors for the succeeding year,  
it shall not be lawful for the minority of any meeting for election,  
either of magistrates or counsellors, or deacons, or other persons,  
who, by the constitution of the respective boroughs, may have votes  
in the election of magistrates or counsellors, to separate from the  
majority of those having right to act by the constitution of the  
borough at such meetings, upon any pretext whatsoever; nor to  
make any separate election of magistrates, counsellors, or electors;  
but the minority shall, in all cases, submit to the election made by  
the majority in all the parts of election; and if any person elected  
by the minority of any such meeting shall presume to vote in the  
election of magistrates or counsellors, or in electing the magistrates  
or counsellors, or in any other step of the election, he shall forfeit  
the sum of one hundred pounds Sterling to any one of the majority  
of such meeting, to be recovered by him in the manner hereafter  
directed.

XXIII. And be it further enacted by the authority aforesaid, that  
no person elected to be a magistrate or counsellor by a minority of  
those having right to vote in elections of the magistrates and coun-  
sellors, shall, upon any pretext whatsoever, presume to act as magi-  
strate or counsellor; and if any person shall, notwithstanding, pre-  
sume to act as magistrate or counsellor, he shall, for every such of-  
fence, forfeit the sum of one hundred pounds Sterling to the ma-  
gistrates



gistrates or counsellors elected by the majority, or to any of them who shall sue for the same, to be recovered by him or them in the manner herein after directed.

XXIV. Provided always, and it is hereby declared and enacted, that it shall and may be lawful to and for any constituent member, at any meeting for election of magistrates or counsellors, or of any meeting previous to that for the election of magistrates and counsellors, respectively, who shall apprehend any wrong to have been done by the majority of such meeting, to apply to the said court of session, by a summary complaint, for rectifying such abuse, or for making void the whole election made by the said majority, or for declaring and ascertaining the election made by the minority, so as such complaint be presented to the said court of session within two kalendar months after the annual election of the magistrates and counsellors; and the said court shall thereupon grant a warrant for summoning the magistrates and counsellors elected by the majority, upon thirty days notice, and shall hear and determine the said complaint summarily, without abiding the course of any roll, and shall allow to the party who shall prevail their full costs of suit.

Wrongs  
done by the  
majority  
may be re-  
dressed by  
the Court of  
Session.

XXV. And whereas the magistrates and counsellors of the royal boroughs in that part of Great Britain called Scotland, by virtue of several laws now in force, are bound to take and subscribe the oath of allegiance, subscribe the assurance, and to take and sign the oath of abjuration, for and on account of their election into their respective offices, and that in his Majesty's courts of session, justiciary, or exchequer, at Edinburgh, or at the quarter sessions of the respective shires and stewartries within which the royal boroughs are situate, which has been found by experience to be attended with great trouble and expence to the said magistrates and counsellors; for remedy thereof, be it enacted by the authority aforesaid, that it shall

Manner of  
magistrates  
and counsel-  
lors taking  
the several  
oaths.



and may be lawful to the said magistrates and counsellors to take and subscribe the oath of allegiance, subscribe the assurance, and take and sign the oath of abjuration, before the council of their respective boroughs; and which oaths the chief magistrate, or any other magistrate of the said boroughs, respectively, is hereby empowered and required to administer; and the oaths so taken shall be equal in all respects as if they had been taken in the courts, and before the judges directed by the several acts of parliament above referred to.

The clerk to sign the commission, and affix the seal of the borough.

XXVI. And be it enacted by the authority aforesaid, that at every election of commissioners for choosing burgeses for any district of boroughs in that part of Great Britain called Scotland, the common clerk of each borough within the said district, shall make out a commission to the person chosen commissioner by the major part of the magistrates and town-council assembled for that purpose, which magistrates and town-council shall take the oath of allegiance, and sign the same with the assurance, and shall take all the other oaths appointed to be taken at such election, by this or any former act, if required; and the said clerk shall affix the common seal of the borough thereto, and sign such commission, and shall not, on any pretence whatsoever, make out a commission for any person as commissioner, other than him who is chosen by the majority, as aforesaid; and if any common clerk of any borough shall neglect or refuse duly to make out and sign a commission to the commissioner elected by the majority as aforesaid, and affix the seal of the borough thereto; or if he shall make out and sign a commission to any other person who is not chosen by the majority, or affix the common seal of the borough thereto, he shall for every such offence forfeit the sum of five hundred pounds Sterling to the person elected commissioner for the said borough as aforesaid, to be recovered by him, or his executors, in the manner herein after directed, and shall



shall also suffer imprisonment for the space of six kalendar months, and be for ever after disabled to hold or enjoy the said office of common clerk of the said borough, as effectually as if he was naturally dead.

XXVII. And be it further enacted by the authority aforesaid, that if any other person, who is not the common clerk of the borough, shall take upon himself to act as such in any election of a commissioner for choosing a burghers for any district of boroughs in that part of Great Britain called Scotland, and shall make out a commission for any other person as commissioner, other than the person who was chosen by the majority as aforesaid, and shall sign or affix the common seal of the borough thereto, he shall, for every such offence, forfeit the sum of five hundred pounds Sterling to the person elected commissioner for the said borough as aforesaid; to be recovered by him or his executors in the manner herein after directed.

Penalty on any person acting as clerk, and making out wrongful commissions.

XXVIII. And whereas, by an act passed in that part of Great Britain called Scotland the fifth day of February, in the year one thousand seven hundred and seven, intituled, 'Act settling the manner of electing the sixteen peers, and forty-five commoners to represent Scotland in the parliament of Great Britain,' it is, amongst other things, enacted, that, where the votes of the commissioners for the said boroughs, met to choose representatives from their several districts to the parliament of Great Britain, shall be equal; in that case, the president of the meeting shall have a casting or decisive vote, and that by and attour his vote as a commissioner from the borough from which he is sent; but no provision is made, in case of the absence of the commissioner from the presiding borough, or of his refusing to vote at such election: For remedy thereof, be it enacted by the authority aforesaid, that, if the commissioner from

Who shall act in absence of the presiding commissioners.



the presiding borough shall be absent from the meeting of commissioners for choosing burgeses to serve in parliament, or shall refuse to vote at such election, the commissioner from the borough which was the presiding borough at the last election; and, if he also be absent, or shall refuse to vote as aforesaid, the commissioner from the borough which was the presiding borough at the election immediately preceeding the last; and in case he shall be likewise absent, or shall refuse to vote as aforesaid, the commissioner from the borough which was the last presiding borough but two shall have, in the aforesaid respective cases, besides his own vote, the casting or decisive vote.

No objection  
against non-  
residents,  
&c.

XXIX. And be it further declared by the authority aforesaid, that it is no objection to any commissioner for choosing a burges, that he is not a residenter within the borough bearing all portable charges with his neighbours, or that he is no trafficking merchant therein, or that he is not in possession of any burgage lands or houses holding of the said borough, and that such qualifications need not be engrossed in his commission; any law, custom, or usage to the contrary notwithstanding.

What votes  
shall be al-  
lowed.

XXX. And be it further enacted by the authority aforesaid, that, at all meetings of commissioners for choosing burgeses to serve in parliament, the common clerk of the presiding borough shall allow the votes of such persons only who produce commissions authenticated by the subscription of the common clerk, and the common seal of the respective boroughs within the district, and shall return to the sheriff or steward the person elected by the major part of the commissioners assembled, whose commissions are authenticated as aforesaid; and if he neglect or refuse to return such persons so elected to the sheriff or steward; or, if he shall return to the sheriff or steward any person other than him who is so elected, he shall, for every



every such offence, instead of the penalty or forfeiture to which he is made liable by the aforesaid act, made in the seventh year of his present Majesty, forfeit the sum of five hundred pounds Sterling to the candidate elected by the majority of the commissioners assembled, whose commissions are authenticated as aforesaid; to be recovered by him or his executors in the manner herein after directed; and he shall also suffer imprisonment for the space of six kalendar months, and be for ever after disabled to hold or enjoy his said office of common clerk of the said presiding borough, as if he was naturally dead.

Penalty.

XXXI. And be it enacted by the authority aforesaid, that every sheriff or steward, in that part of Great Britain called Scotland, shall annex to the writ the return made by the aforesaid clerk of the presiding borough; and if any such sheriff or steward neglect or refuse to annex to the writ such return, or if he shall annex to the writ any return made by any other person, he shall, for every such offence, instead of the penalty or forfeiture to which he is made liable by the aforesaid act, made in the seventh year of his present Majesty, forfeit the sum of five hundred pounds Sterling to the candidate returned by the aforesaid clerk of the presiding borough, to be recovered by him or his executors in the manner herein after directed.

Writ and return to be annexed.

Penalty.

XXXII. Provided always, that, if any person to whom no commission is made out, as aforesaid, shall insist that he was duly elected the commissioner from any royal borough, the person so claiming shall be admitted to the meeting of the commissioners for choosing burgessees to serve in parliament, and may at the said meeting make offer of taking all the oaths required by law, and declare for whom he would have voted had he been duly commissioned; which oaths the clerk of the presiding borough is hereby required and impowered

Proviso.

ed.



ed to administer; and the said clerk shall also set down in the minutes of proceedings, the declaration of such person as to the candidate for whom he would have voted, had he been duly commissioned; but the said clerk shall, upon no pretence whatsoever, receive or consider such person as a legal voter, or such declaration as a legal vote at such election.

Act 2.  
Geo. II.  
confirmed.

XXXIII. And whereas doubts have arisen, whether the act of parliament made in the second year of the reign of his present Majesty, intituled, 'An act for the more effectual preventing bribery and corruption in the election of members to serve in parliament,' extends to the electors of commissioners for choosing burgeses; be it hereby enacted by the authority aforesaid, that the electors of commissioners for any royal borough, within that part of Great Britain called Scotland, for choosing burgeses to parliament, are within the true intent and meaning of the said act, to be considered as electors of the member to serve in parliament, and shall be so deemed and adjudged to all intents and purposes whatsoever, and shall be liable to all the provisions, forfeitures, and incapacities to which persons voting, or claiming to vote for any member to serve in parliament are made liable by the said act.

XXXIV. And be it further enacted by the authority aforesaid, that, at every election of commissioners for choosing burgeses for the several districts of boroughs in that part of Great Britain called Scotland, and at the election of a burges to serve in parliament for the city of Edinburgh, every magistrate, town counsellor, or person having, or claiming to have a right to vote at such election, instead of the oath prescribed to be taken by the said act, before he is admitted to vote at the same election, shall take the following oath, in case the same shall be demanded by any one of the electors; and which



which oath any of the magistrates, or, in their absence, any of the town-council are hereby impowered and required to administer.

"I A. B. do solemnly swear, that I have not, directly or indirectly, by way of loan or other device whatsoever, received any sum or sums of money, office, place, employment, gratuity, or reward, or any bond, bill, or note, or any promise of any sum or sums of money, office, place, employment, or gratuity whatsoever, either by myself or any other, to my use, or benefit, or advantage, or to the use, benefit, or advantage of the city or borough of which I am magistrate, counsellor, or burges, in order to give my vote at this election. So help me God."

Oath to be taken by the magistrates at the election of a burges, &c.

XXXV. And be it further enacted by the authority aforesaid, that, in all elections of commissioners for choosing burges, and before they proceed to election, the common clerk of each borough shall take and subscribe the oath following, which any of the magistrates, or, in their absence, any two of the town-council are hereby impowered and required to administer.

"I A. B. do solemnly swear, that I have not, directly or indirectly, by way of loan or other device whatsoever, received any sum or sums of money, office, place, employment, gratuity, or reward, or any bond, bill, or note, or any promise of any sum or sums of money, office, place, employment, or gratuity whatsoever, either by myself or any other, to my use, or benefit, or advantage, to make out any commission for a commissioner for choosing a burges; and that I will duly make out a commission to the commissioner who shall be chosen by the majority of the town council assembled, and to no other person. So help me God."

Oath to be taken by the common clerk before the election of commissioners to choose burges.

And



And that at all meetings of the commissioners for choosing burgesses to serve in parliament, and before they proceed to the election, the clerk of the presiding borough shall take and subscribe the following oath, which the commissioner for the presiding borough, or, in his absence, any other of the commissioners is hereby required and impowered to administer.

Oath of the clerk of the presiding borough before election.

" I A. B. do solemnly swear, that I have not, directly or indirectly, by way of loan, or other device whatsoever, received any sum or sums of money, office, place, employment, gratuity, or reward, or any bond, bill, or note, or any promise of any sum or sums of money, office, place, employment, or gratuity whatsoever, either by myself, or any other to my use, or benefit, or advantage, to make any return at this election of a member to serve in parliament; and that I will return to the sheriff or steward the person elected by the major part of the commissioners assembled, whose commissions are authenticated by the subscription of the common clerk, and common seal of the respective boroughs of this district. So help me God."

Penalty on the clerk of the presiding borough's neglect.

XXXVI. And be it further enacted by the authority aforesaid, that, if the clerk of the presiding borough shall neglect or refuse to take the oath aforesaid, such clerk so refusing or neglecting shall be incapable to act as clerk to the said meeting, and it shall be lawful to and for the said commissioners, and they are hereby impowered and required to choose another clerk to the meeting for the election, and who shall have all the powers and authorities in the said meeting, and in the returning the member chosen by them, that by law are competent to the clerk of the presiding borough.

XXXVII. And be it further enacted by the authority aforesaid, that, at all the elections of a member to serve in parliament for any county



county or stewartry in that part of Great Britain called Scotland, the clerk chosen by the majority of such persons as stand upon the said roll last made up by the freeholders, whether at the Michaelmas court, or at the last election of a member to serve in parliament, shall immediately after his election take and subscribe the following oath, which the preses of the meeting is hereby required and impowered to administer.

"I A. B. do solemnly swear, that I have not, directly or indirectly, by way of loan or other device whatsoever, received any sum or sums of money, office, place, or employment, gratuity, or reward, or any bond, bill, or note, or any promise of any sum or sums of money, office, place, employment, or gratuity whatsoever, by myself or any other to my use, or benefit, or advantage, to make any return at the present election of a member to serve in parliament; and that I will return to the sheriff or steward the person elected by the majority of the freeholders upon the roll made up at this election, and who shall be present and vote at this meeting. So help me God."

*Ed. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*  
Oath of the clerk at election of members.

XXXVIII. And whereas, by the said act of parliament, made in the second year of the reign of his present Majesty, it is enacted, that every sheriff, mayor, bailiff, head-borough, or other person being the returning officer of any member to serve in parliament, shall, immediately after reading the writ or precept for the election of such members, take and subscribe the oath contained in the aforesaid act; be it enacted by the authority aforesaid, that so much of the said act as requires the said oath to be taken by any returning officer within that part of Great Britain called Scotland, shall be, and is hereby repealed.

Repeal of part of the Act 2. Geo. II.



What shall  
amount to  
conviction of  
perjury.

XXXIX. And be it further enacted by the authority aforesaid, that, if any person shall presume wilfully and falsely to swear and subscribe any of the oaths required to be taken by this act, and shall thereof be lawfully convicted, he shall incur the pains and punishments of perjury, and be prosecuted for the same, according to the laws and forms in use in Scotland.

Writs of  
summons, for  
calling a new  
parliament,  
to be made  
out immedi-  
ately.

XL. And be it further enacted by the authority aforesaid, that, when any new parliament shall, at any time hereafter, be summoned or called, the Lord Chancellor, Lord Keeper, or Lords Commissioners of the great seal for the time being, shall issue out the writs for election of members to serve in parliament for that part of Great Britain called Scotland with as much expedition as the same may be done; and that, as well upon the calling or summoning any new parliament, as also in case of any vacancy during this present, or any future parliament, the several writs shall be delivered to the sheriff or steward to whom the execution thereof does belong or appertain, and to no other person whatsoever; and that every such sheriff or steward, upon the receipt of the writ, shall, upon the back thereof, indorse the day he received the same, and shall forthwith upon the receipt of the writ, at least within the space of four days after the receipt thereof, make out a precept to each borough within his jurisdiction, to elect a commissioner for choosing a burgess to serve in parliament, and shall cause the same to be delivered to the chief magistrate of such borough, resident in the borough for the time being; and in case such sheriff or steward shall neglect to indorse on the back of the writ the day he received the same, or shall neglect to make out his precept, and to deliver the same to the chief magistrate within the time, and in the manner above directed, he shall, for every such offence, forfeit the sum of one hundred pounds Sterling to any magistrate of the borough to which the precept is not timeously

Penalty.



timeously delivered, who shall sue for the same, to be recovered in manner herein after directed.

XLI. And be it further enacted by the authority aforesaid, that such chief magistrate to whom the precept shall be delivered in manner above directed, upon the receipt thereof, shall, upon the back of the precept, indorse the day he received the same, and shall, within two days after his receipt of the precept, call and summon the council of the borough together, by giving notice personally, or leaving notice at the dwelling-place of every counsellor then resident in that borough; which council shall then appoint a peremptory day for the election of a commissioner for choosing a burgeses to serve in parliament.

When the council shall be called for setting a day to choose a commissioner for electing a burgeses.

XLII. Provided always, that two free days shall intervene betwixt the meeting of the council which appoints the day of election of the said commissioner, and the day on which the election of the commissioner is to be made; and in case such chief magistrate shall neglect to indorse the day he received the precept on the back thereof, or to summon the council within the time, and in the manner above directed, he shall for every such offence forfeit the sum of one hundred pounds Sterling to any magistrate or counsellor of the said borough who shall sue for the same, to be recovered in manner herein after directed.

Two days to be allowed between the council meeting and the day of election.

Chief magistrate to indorse the day he received the precept.

XLIII. And be it further enacted by the authority aforesaid, that every penalty or forfeiture by this act imposed, in that part of Great Britain called Scotland, shall and may be sued for and recovered by way of summary complaint before the Court of Session, upon thirty days notice to the person complained of, without abiding the course of any roll; which said complaint the Court of Session is hereby authorised and required to determine; as also to de-

Manner of recovering penalties.



declare the disabilities and incapacities, and to direct the imprisonments, as herein provided.

Limitation  
of actions.

XLIV. Provided always, and it is hereby declared and enacted by the authority aforesaid, that no person shall be made liable to any incapacity, disability, forfeiture, or penalty by this act imposed in that part of Great Britain called Scotland, unless prosecution be commenced within one year after such incapacity, disability, forfeiture, or penalty shall be incurred.

Anno Decimo Quarto GEORGI II. CAP. 81.

*An Act for altering and amending an Act made in the sixteenth year of his late Majesty's reign, intituled, An act to explain and amend the laws touching the Elections of Members to serve for the Commons in Parliament, for that part of Great Britain called Scotland, and to restrain the partiality, and regulate the conduct of returning officers at such elections, by altering the time of notice ordered by the said act to be given in the service of complaints to the Court of Session, of wrongs done in elections, and by regulating the manner, and settling the place of election of a burghers to serve in parliament for a district of boroughs in Scotland, when the election of the magistrates and council of a borough, which ought in course to be the presiding borough at an election, happens to be reduced, and made void by a decree of the Court of Session, and not revived by the crown when such an election is made.*

Preamble.  
Act 16.  
Geo. II.

WHEREAS, by an act made in the sixteenth year of his late Majesty's reign, intituled, ' An act to explain and amend the laws ' touching the elections of members to serve for the Commons in ' parliament for that part of Great Britain called Scotland, and to ' restrain



‘restrain the partiality, and regulate the conduct of returning officers at such elections;’ complaints to the Court of Session, for redress of wrongs committed by the enrolling, or refusing to enrol persons claiming to be enrolled in the roll of freeholders, or in the annual elections of royal boroughs, are ordered to be served upon thirty days notice; and whereas it is found by experience so long notice is unnecessary, and occasions delay in the summary determination of such complaints, agreeable to the intendment of the said act, May it therefore please your Majesty that it may be enacted, and be it enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that from and after the twelfth day of June, in the year of our Lord one thousand seven hundred and seventy-four, the Court of Session shall grant warrants for the service of all such complaints as aforesaid, upon fifteen days notice.

Court of Session, on fifteen days notice, shall grant warrants for service of complaints, for redress of wrongs committed by enrolling, &c.

II. And whereas the elections of magistrates and counsellors of royal boroughs in Scotland have sometimes been reduced and made void by decrees of the Court of Session, in actions or complaints brought before the said court for that purpose, by which the corporate power of such boroughs are, in effect, in a state of nonexistence, until restored by the justice and favour of the crown; and whereas no provision is made in the foresaid act of the sixteenth year of the reign of his late Majesty, or any other act now in being, for regulating the manner, and settling the place of election of a burghs to serve in parliament for a district of boroughs in Scotland, when the election of magistrates and council of a borough, which ought in course to have been the presiding borough at the election, happens to be reduced, and not revived when the election is made; for remedying thereof, be it enacted by the authority aforesaid, that in every election of a burghs to serve in parliament for a district of boroughs

Election of a burghs to serve in parliament regulated.



boroughs in Scotland, when it shall happen that the election of the magistrates and council of the borough, which ought to have been the presiding borough at such election, is reduced, and not revived, the next borough intitled to preside in turn shall be the presiding borough, and the election shall be made at that borough, and the commissioner for that borough shall be the president of the meeting of commissioners for the election, and have a casting and decisive vote, besides his own as commissioner, where the votes of the commissioners are equal; and the common clerk of that borough shall be clerk to the election; and every matter and thing concerning the election shall be proceeded in as if that borough had been the presiding borough in the ordinary course of rotation.

The presiding borough of the district how to be ascertained.

III. And be it further enacted by the authority aforesaid, that the borough which would have been the presiding borough at the election, if the election of the magistrates and counsellors of such borough had not been reduced, shall, when revived by the justice and favour of the crown, have no right or title to be a presiding borough in the election of a burgess to serve in parliament for the district of boroughs of which it is one, until the other boroughs of the district, each in their turn, have successively presided, and that the right devolves upon such borough in the ordinary course of rotation.

Anno Vicefimo Secundo GEORGII III. REGIS. CAP. 41.

*An Act for better securing the freedom of elections of Members to serve in parliament, by disabling certain officers employed in the collection or management of his Majesty's revenues from giving their votes at such elections.*

Preamble.

FOR the better securing the freedom of elections of members to serve in parliament, be it enacted by the King's most excellent Majesty,



Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of August one thousand seven hundred and eighty-two, no commissioner, collector, supervisor, gauger, or other officer or person whatsoever, concerned or employed in the charging, collecting, levying, or managing, the duties of excise, or any branch or part thereof; nor any commissioner, collector, comptroller, searcher, or other officer or person whatsoever, concerned or employed in the charging, collecting, levying, or managing the customs, or any branch or part thereof; nor any commissioner, officer, or other person, concerned or employed in collecting, receiving, or managing, any of the duties on stamped vellum, parchment, and paper; nor any person appointed by the commissioners for distributing of stamps; nor any commissioner, officer, or other person employed in collecting, levying, or managing, any of the duties on salt; nor any surveyor, collector, comptroller, inspector, officer, or other person employed in collecting, managing, or receiving, the duties on windows or houses; nor any postmaster, postmasters general, or his or their deputy, or deputies, or any person employed by or under him or them, in receiving, collecting, or managing, the revenue of the post-office, or any part thereof; nor any Captain, master, or mate, of any ship, packet, or other vessel, employed by or under the postmaster, or postmasters general, in conveying the maill to and from foreign ports, shall be capable of giving his vote for the election of any knight of the shire, commissioner, citizen, burghers, or baron, to serve in parliament for any county, stewartry, city, borough, or cinque port, or for choosing any delegate in whom the right of electing members to serve in parliament for that part of Great Britain called Scotland, is vested: And if any person hereby made incapable of voting, as aforesaid, shall nevertheless presume to give his vote during the time he shall hold, or within twelve kalendar months after he

From August 1. 1782, no commissioner or officer employed in collecting or managing the duties of excise, customs, &c. shall have any vote in the election of members of parliament.

Penalty on persons voting who are disqualified by this act.



he shall cease to hold, or execute any of the offices aforesaid, contrary to the true intent and meaning of this act, such votes so given shall be held null and void to all intents and purposes whatsoever, and every person so offending shall forfeit the sum of one hundred pounds, one moiety thereof to the informer, and the other moiety thereof to be immediately paid into the hands of the treasurer of the county, riding, or division, within which such offence shall have been committed, in that part of Great Britain called England; and into the hands of the clerk of the justices of the peace of the counties or stewartries in that part of Great Britain called Scotland, to be applied and disposed of to such purposes as the justices, at the next general quarter session of the peace to be held for such county, stewartry, riding, or division, shall think fit, to be recovered by any person that shall sue for the same, by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, in which no essoin, protection, privilege, or wager of law, or more than one imparlance shall be allowed; or by summary complaint before the court of session in Scotland; and the person convicted on any such suit shall thereby become disabled and incapable of ever bearing or executing any office, or place of trust whatsoever, under his Majesty, his heirs, and successors.

Not to extend to commissioners of the land tax, or persons acting under them.

II. Provided always, and be it enacted, that nothing in this act contained shall extend, or be construed to extend, to any person or persons, for or by reason of his or their being a commissioner, or commissioners, of the land-tax, or for, or by reason of his or their acting by or under the appointment of such commissioners of the land-tax, for the purpose of assessing, levying, collecting, receiving or managing, the land-tax, or any other rates or duties already granted or imposed, or which shall hereafter be granted or imposed by authority of parliament.

III.



III. Provided also, and be it further enacted, that nothing in this act contained shall extend, or be construed to extend, to any office now held, or usually granted to be held, by letters patent, for any estate of inheritance or freehold.

Nor to offices held by letters patent for any estate of inheritance.

IV. Provided always, and be it enacted by the authority aforesaid, that nothing herein contained shall extend to any person who shall resign his office or employment on or before the said first day of August one thousand seven hundred and eighty-two.

Nor to persons who shall resign their offices before August 1. 1782.

V. Provided also, and be it enacted, that no person shall be liable to any forfeiture or penalty by this act laid or imposed, unless prosecution be commenced within twelve months after such penalty or forfeiture shall be incurred.

Limitation of actions.

Anno Vicefimo Secundo GEORGII III. REGIS. CAP. XLV.

*An Act for restraining any Person concerned in any contract, commission, or agreement made for the public service from being elected or sitting and voting as a member of the House of Commons.*

FOR further securing the freedom and independence of parliament, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that, from and after the end of this present session of parliament, any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole or in part, any contract, agreement, or commission made or entered into with, under, or from the commissioners

Preamble.

After the end of this session, all persons holding contracts for the public service shall be incapable of being elected or sitting in the House of Commons.



of his Majesty's treasury, or of the navy or victualling-office, or with the master-general or board of ordnance, or with any one or more of such commissioners, or with any other person or persons whatsoever, for or on account of the public service, or shall knowingly and willingly furnish or provide in pursuance of any such agreement, contract, or commission which he or they shall have made or entered into, as aforesaid, any money to be remitted abroad, or any wares or merchandize to be used or employed in the service of the public, shall be incapable of being elected, or of sitting or voting as a member of the House of Commons during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or emolument arising from the same.

Any member accepting a contract, or continuing to hold any contract after the commencement of the next session, his seat shall be void.

II. And be it further enacted by the authority aforesaid, that, if any person, being a member of the House of Commons, shall, directly or indirectly, himself, or by any other person whatsoever in trust for him, or for his use or benefit, or on his account, enter into, accept of, agree for, undertake, or execute, in the whole or in part, any such contract, agreement, or commission, as aforesaid; or if any person, being a member of the House of Commons, and having already entered into any such contract, agreement, or commission, or part or share of any such contract, agreement, or commission, by himself, or by any other person whatsoever, in trust for him, or for his use or benefit, or upon his account, shall, after the commencement of the next session of parliament, continue to hold, execute, or enjoy the same, or any part thereof, the seat of every such person in the House of Commons shall be, and is hereby declared to be void.

Not to extend to incorporated trading companies.

III. Provided always, and be it enacted, that nothing herein contained shall extend, or be construed to extend to any contract, agreement,



ment, or commission made, entered into, or accepted by any incorporated trading company, in its corporate capacity, nor to any company now existing or established, and consisting of more than ten persons, where such contract, agreement, or commission shall be made, entered into, or accepted, for the general benefit of such incorporation or company.

IV. Provided also, and be it enacted, that nothing in this act contained shall extend, or be construed to extend to any contract, agreement, or commission made, entered into, or accepted before the passing of this act, the term whereof will expire in the space of one year from the time of making thereof.

Not to extend to contracts already made for one year.

V. Provided also, and be it enacted, that, where any contract, agreement, or commission has been made, entered into, or accepted, with a provision that the same shall continue until a year's notice be given of the intended dissolution thereof, the same shall not disable any person from sitting and voting in parliament, until one year after the said notice shall be actually given for the determination of the said contract, agreement, or commission, or till after twelve kalendar months, to be computed from the time of passing this act.

Clause relative to contracts which are not to expire until a year's notice be given.

VI. Provided also, and be it enacted, that nothing herein contained shall extend, or be construed to extend to any person on whom, after the passing of this act, the completion of any contract, agreement, or commission shall devolve by descent or limitation, or by marriage, or as devisee, legatee, executor, or administrator, until twelve kalendar months after he shall have been in possession of the same.

Not to extend to contracts by descent, &c. until after 12 months possession.



Members holding contracts may be discharged therefrom, on giving 12 months notice.

Clause relative to patentees for new inventions.

If any person, hereby disqualified, shall be elected, such election shall be void.

Disabled persons who shall sit in the House of Commons after this session, shall forfeit L. 500 for each day.

VII. Provided also, and be it enacted, that any person who is now a member of the House of Commons, and holds and enjoys any such contract, agreement, or commission, as aforesaid, may be discharged from the execution thereof, on giving twelve months notice to the person or persons with, or from whom such contract, agreement, or commission is made, entered into, or accepted, of his desire that the same shall cease and determine; and such contract, agreement, or commission, after the expiration of the term aforesaid, shall be null and void.

VIII. Provided also, that, if any person, actually possessed of a patent for a new invention, or a prolongation thereof by act of parliament, and having contracted with government concerning the object of the said patent before the passing of this act, shall give notice of his intention to dissolve the said contract, the same shall be null and void from the time of giving such notice.

IX. And be it further enacted by the authority aforesaid, that, if any person, hereby disabled or declared to be incapable to sit or vote in parliament, shall nevertheless be returned as a member to serve for any county, stewartry, city, borough, town, cinque port, or place in parliament, such election and return are hereby enacted and declared to be void: And if any person, disabled and declared incapable by this act to be elected, shall, after the end of this present session of parliament, presume to sit or vote as a member of the House of Commons, such person, so sitting or voting, shall forfeit the sum of five hundred pounds for every day in which he shall sit or vote in the said House, to any person or persons who shall sue for the same in any of his Majesty's courts at Westminster; and the money so forfeited shall be recovered by the person or persons so suing, with full costs of suit, in any of the said courts, by any action of debt, bill, plaint, or information, in which no essoin, privilege, protection,

or



or wager of law, or more than one imparlance shall be allowed, or by summary complaint before the Court of Session in Scotland: And every person against whom any such penalty or forfeiture shall be recovered by virtue of this act, shall be from thenceforth incapable of taking or holding any contract, agreement, or commission for the public service, or any share thereof, or any benefit or emolument from the same in any manner whatsoever.

X. And be it enacted, that, in every such contract, agreement, or commission to be made, entered into, or accepted as aforesaid, there shall be inserted an express condition, that no member of the House of Commons be admitted to any share or part of such contract, agreement, or commission, or to any benefit to arise therefrom; and that, in case any person or persons, who hath or have entered into or accepted, or who shall enter into or accept any such contract, agreement, or commission, shall admit any member or members of the House of Commons to any part or share thereof, or to receive any benefit thereby, all and every such person and persons shall, for every such offence, forfeit and pay the sum of five hundred pounds, to be recovered, with full costs of suit, in any of his Majesty's courts of record at Westminster, by any person or persons who shall sue for the same, by any action of debt, bill, plaint, or information, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed, or by summary complaint before the Court of Session in Scotland.

XI. Provided also, and be it enacted, that no person shall be liable to any forfeiture or penalty inflicted by this act, unless a prosecution shall be commenced within twelve kalendar months after such penalty or forfeiture shall be incurred.

Members  
holding con-  
tracts may be  
discharged  
therefrom  
on giving 12  
months no-  
tice.

A condition  
to be inser-  
ted in all  
public con-  
tracts, that  
no member  
of the House  
of Commons  
shall have  
any share  
thereof.  
Penalty on  
contractors  
who shall ad-  
mit any  
member of  
the House of  
Commons to  
any share of  
their con-  
tracts.

Limitation  
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